

Sentencing Reforms in a Postcolonial Society

A Call for the Rationalisation of Sentencing Discretion in Nigeria,
Drawing on South Africa and England

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DECLARATION

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ABSTRACT

Norval Morris' statement that '[n]o principled jurisprudence of sentencing will emerge before legislatures bring order to their penal statutes or before judges routinely provide reasons for the sentences they impose' aptly describes the range of sentencing problems in Nigeria. Although Nigeria attained self-rule in 1960, its criminal justice system remains hamstrung by the colonial mould in which it was framed, unable to respond to the evolving challenges of combating crime in the twenty-first century. The system's failure is acute in criminal sentencing, exacerbated by common law and sharia based penal systems that encourage excessive penalties, a Constitution that offers minimal protection to convicted offenders, and sentencers who exercise largely unfettered discretion. These factors, together with a narrow construction of the doctrine of separation of powers that precludes courts from subjecting statutory penalties to constitutional scrutiny, result in punitive and frequently disproportionate punishments in Nigeria. This thesis investigates measures to ensure that sentencers introduce proportionality to sentencing and refrain from imposing penalties that infringe constitutional rights. The investigation involves two stages of analysis. First, the thesis examines the socio-historical context in which the practice of punishment evolved in England, South Africa and Nigeria in order to unveil how evolving concepts about punishment regulate or fail to regulate penal severity. Secondly, the thesis examined the normative basis of sentencing in South Africa and Nigeria, both of which are constitutional democracies and former English colonies. The analysis leads to two critical findings. First, Nigeria lacks the rich tapestry of constitutional jurisprudence that South African Courts have developed around punishment. Secondly, neither South Africa nor Nigeria has a structured system for rationalising sentencing discretion, with the result that sentencing can lead to widely disparate and disproportionate outcomes in both countries. The thesis thus proposes that Nigeria adopts constitutional provisions that restrain penal severity, and that it harmonise its pluralistic penal system, scrutinise statutory penalties in the light of constitutional norms, and, drawing on practices in England, develop guidelines that enhance proportionality and parsimony in sentencing.

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Chapter 1 Introduction

1.1 Background to the Research

Recurrent themes in criminal justice discourse in Nigeria have centred on perennial delays in criminal trials, poor coordination between agencies of the criminal justice system, the abuse of bail and excessive use of custodial measures, amongst others.¹ These problems have been widely blamed on dismal failures of governance in post-colonial Nigeria, which have rendered the criminal justice system ineffectual.² They have also been widely cited for abridging due process and contributing to prison congestion. The more drastic abuses, however, are associated with the use of custodial measures,³ which generally take two forms. The first is called the holding charge, a procedural term that describes how Nigerian courts remand suspects pending the completion of police investigations into their cases. The police habitually resort to this process to keep suspects detained while conducting investigations. The problem, however, is that investigations often go on indefinitely, while the suspects remain incarcerated on the authority of a judicial order, but without arraignment before a competent court.⁴ The second form of custodial measure is the prison sentence, a dispositive measure that concludes a criminal trial.

In recent years, Nigeria's prison population has fluctuated between 42,000 and 55,000 inmates.⁵ Studies associate these statistics with excessive reliance on custodial measures.⁶ They

¹ Ayo Atsenuwa 'Criminal justice reforms in areas of bail, remand and sentencing' in Otteh J.C. (ed.) *Reforming for Justice: A Review of Justice Sector Reforms in Nigeria, 1999-2007* (2007) 75-107 at 80-83 & 88.

² Etannibi EO Alemika 'Criminal justice: Norms, politics, institutions, processes and constraints' in Annie Barbara Chikwanha (ed) *The Theory and Practice of Criminal Justice in Africa* Monograph 161 (June 2009) 11-33 at 24-28; O Oko Elechi *Doing Justice Without the State: The Afikpo (Ehigbo) Nigeria Model* (2006) 75-95.

³ For a detailed analysis of Nigeria's criminal justice problems, see The Nigerian Law Reform Commission *Towards a More Consistent and Uniform Sentencing Programme in Nigerian Courts* (1983); see also Chudi Nelson Ojukwu & Onimim E. Briggs 'Developing justice in developing states: The Nigerian experience' (Undated) available at <http://www.isrcl.org/Papers/2005/Briggs.pdf>, accessed 29 July 2013.

⁴ This portrays the holding charge as a mechanism for circumventing the constitutional requirement to arraign suspects within a reasonable time. See s 35(4) of the Constitution of the Federal Republic of Nigeria 1999. The holding charge is a pretrial detention process permitted by s 236(3) of the Criminal Procedure Law Cap 32, Vol. 2 Laws of Lagos State 1994. The provision authorises magistrates to detain offenders for indictable offences, pending their arraignment before a court of competent jurisdiction. Abuses of the power abridge constitutional rights to liberty and fair trial. Often, the term has been used to refer to detainees who are undergoing trials that have been unduly prolonged and for which an end is not in sight.

⁵ See Nigerian Prisons Service 'The reformer' Vol. 2 No. 5 (January to March 2008), 62-68; Nigerian Prisons Service 'The reformer' Vol. 4 No. 4 (January to June 2012) 11; see also Amnesty International *Prisoner's Rights*

also indicate that pre-trial detainees make up 64 – 72 per cent of the prison population.⁷ Apparently, it is this larger percentage of the prison population that has focused the attention academics and penal reformers on reforming pre-trial detention. Important reforms have indeed been achieved in this regard,⁸ facilitated by the publicity that persistent objections to human rights abuses associated with pre-trial detention garnered. The objections, which were conveyed through well-articulated papers, essentially constructed the abuses as violations of constitutional guarantees for the rights to liberty and a fair trial.⁹ However, the debates have also raged on another forum. In the Supreme Court case of *Lufadeju v Johnson*,¹⁰ lawyers framed the holding charge – the main contributor to Nigeria’s pre-trial detainee population – as an infringement of constitutional rights. Even though the constitutional challenge was lost, opposition to the practice has persisted.¹¹

Systematically Flouted (2008) 22-23, 55-56; Policy and Legal Advocacy Centre ‘Senate seeks to end the problem of prison congestion in Nigeria’ available at http://www.placng.org/new/main_story.php?sn=35, accessed 10 March 2012.

⁶ Ibid.

⁷ See OA Ogundipe ‘Pre-trial detention and contemporary corrections: The Nigerian dilemma’ being a paper presented at the 11th Annual Conference on the International Corrections and Prisons Association, Bridgetown, Barbados, October 25-30, 2009; Uju Agomoh ‘Prison decongestion and reforms in Nigeria – issues and methods’ available at <http://www.prawa.org/wp-content/uploads/2012/06/Prison-Decongestion-and-Reform.pdf>, accessed 11 March 2014.

⁸ Lagos State in South-West Nigeria offers a tangible example; it enacted the Administration of Criminal Justice Law (Repeal and Re-enactment) Law 2011, which instates tighter controls over remand processes than was the case under the repealed Criminal Procedure Law Cap C18 Laws of Lagos State 2003. See Atsenuwa op cit note 1 at 93-96, 98-104. Sections 264-267 of the new law more clearly spells out circumstances and procedures for issuing remand orders. They limit pre-trial detention to 30 days, allow a month’s extension and subsequent extensions if the prosecution can show cause. These measures strengthen judicial oversight of pre-trial detention and empower magistrates to make reasonable cause enquiries, review and monitor the progress of criminal investigations. A federal bill to instate similar reforms has been much delayed. See Comfort Chinyere Ani ‘Reforms in the Nigerian criminal procedure laws’ (2011) Vol. 1 *NIALS Journal on Criminal Law and Justice* 52-90 at 74-77, 82-85.

⁹ Eric Ayemere Okojie and Lucky Ehinem Enakemere ‘The legality of the practice of holding charge under the Nigerian criminal justice system’ (2014) Vol. 4 No. 1 *African Journal of Law and Criminology* 1-10; see also Amnesty International op cit note 5 at 7-11.

¹⁰ (2007) NWLR (Pt 1037) 535. However, in this case, the court upheld the constitutionality of the procedure, saying no rights were abridged in the circumstances of the case. This decision has been severely criticised for overlooking the human rights dimensions of exploitative pre-trial detention processes. See Agbakoba, Olisa ‘Criminal justice reform and challenge of holding charge’ available at <http://www.agbakoba-associates.com/media/articles/Criminal-Justice-Reform-and-Challenge-of-Holding-Charge.pdf>, accessed 12 March 2014; Okojie and Enakemere op cit note 9; see also Amnesty International op cit note 5.

¹¹ See Chijioke Ogham-Emeka ‘Nigeria: Issues in administration of criminal justice reform’ *Daily Independent* 18 August 2010 available at <http://allafrica.com/stories/201008190565.html>, accessed 12 March 2014.

In the light of the foregoing, resolving pre-trial detention procedures – alongside bail – became central to criminal justice reforms in Nigeria¹² and to prison decongestion measures.¹³ In the process, the need for sentencing reforms was overlooked or given less than the attention it deserved. Yet, sentencing, and its problems, has been the subject of study for much longer. Studies have noted that as far back as 1962, courts relied heavily on prison sentences, even when they lacked demonstrable penal value. Evidence at the time pointed to the high failure rates of imprisonment in correcting criminal behaviour and to serious disparities in sentences. These disparities were attributed to the wide, unbridled discretion that sentencers exercised in most cases and to the elimination of discretion in others. The problems were also compounded by ineffectual sentencing guidelines.¹⁴

These studies were sustained into the 1980s and their observations were consistent, backed in some cases by empirical narratives.¹⁵ In 1983, a national study of sentencing reported ‘highly discretionary and most discrepant [patterns], varying largely from rural to urban areas and even from state to state’.¹⁶ The study went as far as considering and recommending the establishment of an agency to develop sentencing standards and guidelines.¹⁷ From the late 1980s until recent years however, the intensity of this promising engagement with sentencing almost completely evaporated. The paucity of engagement on the subject apparently led Ayo

¹² Indeed, reforming pre-trial detention went hand in hand with reforming bail. See J Nnamdi Aduba & Emily I Alemika ‘Bail and criminal justice administration in Nigeria’, in Annie Barbara Chikwanha (ed) *The Theory and Practice of Criminal Justice in Africa*, (June 2009) Monograph 161 85-109; Y Osinbajo ‘Approaches to reducing pre-trial incarceration in Lagos’, available at <http://www.isrcl.org/Papers/2006/Osinbajo.pdf>, accessed 25 July 2012.

¹³ See Agomoh op cit note 7 at 6-9; Federal Republic of Nigeria ‘National action plan for the promotion and protection of human rights in Nigeria, 2009-2013’ paras 5.4.3.4, 5.4.4, 5.4.5, 5.5.4, 5.5.5 available at www.ohchr.org/Documents/Issues/NHRA/nigeria.pdf, accessed 12 March 2012. In a recent prison update, the National Human Rights Commission recommended collaboration between the Nigeria’s Legal Aid Council and the Nigerian Bar Association in the provision of free legal aid services to pre-trial detainees, in order to ‘foster fair hearing, access to justice and ... encourage decongestion’. A National Decongestion Committee was also established to manage the process. See National Human Rights Commission *Harmonized Report of 2012 Prison Audit* (2012) 8, 11-12, 50 available at <http://www.nigeriarights.gov.ng/resources> accessed 12 March 2014.

¹⁴ The guidelines were offered in judicial pronouncements. See AA Adeyemi ‘Administration of justice in Nigeria: Sentencing’ in Adeyemi, AA (ed) *Law, development and administration in Nigeria* (1990) 109 at 110-111, 121, 140-141; JA Adefarasin ‘Sentencing’ in AA Adeyemi (ed) *Law, Development and Administration in Nigeria* (1990) 159.

¹⁵ In 1972, a publication was dedicated to recording the experiences of Nigerian judges and magistrates. See Fatayi A Williams ‘Sentencing processes, practices and attitudes: As seen by an appeal court judge’ in TO Elias (ed) *The Nigerian Magistrate and the Offender* (1972) 31-38; IO Fadipe ‘Sentencing processes, practices and attitudes: As seen by a magistrate and customary court judge’ in TO Elias (ed) *The Nigerian Magistrate and the Offender* (1972) 39-48.

¹⁶ The Nigerian Law Reform Commission op cit note 3 at 13, 29-37.

¹⁷ Ibid.

Atsenuwa,¹⁸ a leading Nigerian professor of criminology and criminal justice, to refer to sentencing studies that were mostly published before the 1990s, in her 2007 review of criminal justice reforms that had taken place in Nigeria between 1999 and 2007. Since the 1980s and until the last few years when interest in sentencing revived, there was a prolonged hiatus of interest on the subject. As a result, despite an extensive search of libraries and online data bases, very few resources – particularly recent sources – could be found for his study. It is hoped that this thesis is one step to building current literature on the subject.

The recent revival of interest suggests that Nigerian academia, penal reformers and administrators are awakening to the importance of reforming Nigeria's sentencing system. Proposals for the development of sentencing guidelines in Nigeria have been made.¹⁹ Despite these laudable developments, however, inadequate attention has been given to the constitutional and human rights implications of the sentencing problem in Nigeria. Studies about how sentencing practice impacts the rights of convicts, or whether courts weigh the sentences they impose against constitutional imperatives to preserve the rights of offenders are painfully scarce.

As this thesis will show, a cogent human rights perspective that explores and develops the constitutional basis for penal law and sentencing has yet to be injected into current efforts to review penal laws and reform sentencing. As a result, recently enacted penal statutes or those pending enactment continue to omit important sentencing principles or safeguards. This thesis urges two safeguards in this respect. First, sentencing needs to be infused with constitutional protections for human dignity. Secondly, Nigeria needs a sentencing scheme that regulates punishment on the basis of offence gravity and maintains (within the overall sentencing scheme) relative proportionality between sentences for types and subtypes of crimes. This scheme would enhance relative equality in the treatment of offenders, making sure that similar offences receive similar sentences and that offenders are not punished more or less severely than their crimes deserve.

¹⁸ See generally Atsenuwa op cit note 1.

¹⁹ See discussion in chapter 4 section 4.6 below.

1.2 **Problem Statement**

The 1999 Constitution of the Federal Republic of Nigeria contains no provision that regulates penal severity in Nigeria. Even if one were to be inferred, it would be so vague, oblique and inadequate as to render it ineffectual. Two consequences flow from this observation. First, the absence of a constitutional provision encourages penal statutes that prescribe penalties that are often seriously disproportionate to offence gravity. Secondly, courts have maintained an obligation to apply statutory penalties without necessary regard to whether the penalties are so disproportionate as to violate standard international norms against cruel, inhuman or degrading punishment. Together, penal legislation and judicial sentencing combine to produce a harsh regime of punishments in Nigeria. These assertions are illustrated in the following examples.

The first illustration exemplifies how Nigeria's sentencing scheme fails to maintain an effective ceiling on penal severity, or relative penal severity (proportionality) between types or subtypes of crimes, or between the different levels of seriousness or harm that may accompany the commission of a crime. Under the Robbery and Firearms (Special Provisions) Act²⁰ for example, the penalty for robbing with a firearm or other offensive weapon (commonly called armed robbery in Nigeria) is death. As long as the offence is perpetrated with the aid of an offensive weapon, the penalty will apply regardless of whether or not grievous bodily harm or unlawful killing occurred. Thus, the Act exacts the most severe punishment where no life is taken, or bodily injury is inflicted. Further, it provides no internal scheme for differentiating between armed robberies that differ significantly in terms of the value of the stolen item, or the levels of threat employed. This, in other words, suggests that the Act regards all armed robberies

²⁰ Chapter R11 Laws of the Federation of Nigeria 2004. Section 1 thereof provides:

1. (1) Any person who commits the offence of robbery shall upon trial and conviction under this Act, be sentenced to imprisonment for not less than twenty-one years.

(2) If

(a) any offender mentioned in subsection (1) of this section is armed with any firearms or any offensive weapon or is in company with any person so armed; or
(b) at or immediately before or immediately after the time of the robbery the said offender wounds or uses any personal violence to any person,

the offender shall be liable upon conviction under this Act to be sentenced to death.

(3) The sentence of death imposed under this section may be executed by hanging the offender by the neck till he be dead or by causing such offender to suffer death by firing squad as the Governor may direct.

as equally blameworthy.²¹ A similar predicament is portrayed by recent laws that prescribe the death sentence for kidnapping.²²

The absence of relative proportionality does not only occur within the structure of a single crime only; it is also found across different statutes. Stealing under the Criminal Code that applies in southern Nigeria attracts a sentence of up to three years in prison,²³ while it attracts up to five years imprisonment under the Penal Code of Northern Nigeria.²⁴ The different levels of penal severity that these unveil within the same national legal system will be discussed later.²⁵ Yet another example of the lack of relative proportionality can be found between crimes that fall within the same genre, which may be regulated by the same or by different statutes. Examples in this category include the penalties for stealing on one hand and for criminal misappropriation on the other. Both offences are property crimes. Although the latter involves an element of the breach of public trust that could raise the degree of blameworthiness, both are liable to the same

²¹ While this thesis was being written, a Bill for an Act to Amend the Robbery and Firearms (Special Provisions) Act 2013 was introduced to Nigeria's federal parliament. The aim of the bill is to amend the Act 'in order to bring it in consonance with the dictates of natural justice, equity and good conscience'. The Bill probably reflects new sensitivity to the severity of sentences prescribed by the Act as it proposes to amend s 1(2) of the Act by replacing the death penalty with a life sentence and creating a new subsection (3) that requires the death penalty where armed robbery results in the death of the victim. This is a welcome development, but the proposed law still fails to differentiate between levels of seriousness for armed robberies in which a life sentence would be imposed. Until the bill becomes law, the Act will continue to be enforced. Thus far, its enforcement reflects the absence of proportion. In *Joseph Amoshima v The State* (2011) LPELR-SC.283/2009, the appellant was sentenced to death for robbing with a firearm and causing the death of another. However, in *Francis Odili v The State* (1977) A.N.L.R 49, the same sentence was imposed on the appellant, who participated in a robbery in which several machete cuts were inflicted by his accomplice on the victims while he brandished a gun, even though the victims recovered from the wounds. In *Anthony Isibor v The State* (2002) 2 S.C (Pt.II) 110 the appellant stole a car and money at gunpoint and was sentenced to death. No actual physical violence was involved besides the fact that the items were stolen at gunpoint. The Supreme Court upheld the conviction. See also *Udeh Kingsley Emeka v The State* LER[2014]SC.347/2011. It must be noted, however, that where death results from an armed robbery, the suspect may be charged with armed robbery and for culpable homicide punishable with death, in which case he will be liable to two death sentences. See *Adamu Saliu v The State* LER[2014]SC. 366/2011.

²² Abia, Akwa Ibom, Anambra, Ebonyi, Edo, Enugu and Imo States have enacted laws that make death penalty the punishment for kidnapping even when it did not result in death. See Death Penalty Worldwide 'Nigeria' (2014) available at <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Nigeria#a22-3>, accessed 16 January 2015.

²³ See s 390 of the Criminal Code Act, Cap 77, Laws of Nigeria 1990.

²⁴ See s 287 of the Penal Code of Kano State of Nigeria. This provision in the Kano State Law was adopted from s 287 of the 1959 Northern Nigeria Penal Code. The provision is reproduced in Gledhill, Alan 'The Penal Codes of Northern Nigeria and the Sudan (1968) Sweet & Maxwell, London and African Universities Press, Lagos, 542.

²⁵ See chapter 1 section 4 and chapter 2 section 3 below.

sentence under the Criminal Code.²⁶ Under the Penal Code however, such conversion would amount to criminal misappropriation, which attracts less punishment than theft.²⁷

The second illustration describes how judicial sentencing intensifies the absence of relative penal proportionality between crimes. To illustrate this point clearly however, it is necessary to depict the context in which the illustration is made. Nigeria has one of the worst corruption profiles in the world. Corruption became endemic during military rule,²⁸ but following Nigeria's democratic transition in 1999, legislative and other measures were adopted to combat it. One of these,²⁹ the Economic and Financial Crimes Commission (Establishment) Act 2004, established the Economic and Financial Crimes Commission (EFCC) to investigate financial crimes and enforce laws and regulations relating to economic and financial crimes. Despite this and other anti-corruption efforts however, perceptions of corruption in public life have remained intolerably high.³⁰

These perceptions have factored high in the prosecution of economic and financial crimes in Nigeria. In January 2013 the EFCC secured a conviction against Mr John Yakubu Yusufu for his roles in the criminal misappropriation of police pension funds.³¹ Criminal charges were brought pursuant to s 308 of the Penal Code and punishable under s 309, which prescribes a sentence of two years imprisonment, or fine, or both. Mr Yusuf was arraigned under a 20 count charge, to which he pleaded not guilty. However, he changed his plea when the counts were reduced to three and admitted converting ₦2 billion in pension funds to personal use. He was

²⁶ See s 383 of the Criminal Code, which also extends the meaning of stealing to include the fraudulent conversion of money to personal use.

²⁷ See s 309 of the Penal Code; see also Timothy F Yerima 'Criminal Law Protection of Property: A comparative critique of the offences of stealing and theft in Nigeria' (2012) Vol. 5 No. 1 *Journal of Politics and Law* 167-179

²⁸ John Mukum Mbaku *Corruption in Africa: Causes, Consequences, and Cleanups* (2007) 8-48.

²⁹ The other statute is the Corrupt Practices and Other Related Offences Act, 2000. The Act established the Independent Corrupt Practices Commission.

³⁰ Nigeria is among the worst performing countries in the global corruption perception index. In 2011, Nigeria ranked 143rd, and 139th in 2012. In 2013, it slipped to 144 out of 177 countries. Transparency International attributes the poor showing in global rankings to high rates of abuse of public power for personal gain, suggesting there are no effective control mechanisms for corruption. See Transparency International *Corruption perceptions index 2011* (2011); Transparency International *Corruption perceptions index 2012* (2012); Transparency International *Corruption perceptions index 2013* (2013); see further Transparency International 'Corruption by country/territory' available at <http://www.transparency.org/country#NGA>, accessed 16 March 2014.

³¹ *FRN v John Yakubu Yusufu* Unreported case no FHC/ABJACR/54/2012 (28 January 2013).

consequently convicted and sentenced to two years with the option of ₦250,000 fine on each count. He paid a total of ₦750, 000, forfeited assets, and was released.

The sentence was puzzlingly lighter than what an offender could have received for stealing ₦100³² under s 287 of the same code, which prescribes a maximum of five years imprisonment, without the option of fine.³³ A huge outcry ensued and government's commitment to the anti-corruption fight came under public ridicule. Knee-jerk reactions also followed. Embarrassed, the EFCC re-arrested Mr Yusuf within 24 hours of his release, to re-arraign him on fresh fraud charges.³⁴ Parliament's lower house³⁵ called for an appeal against the sentence and vowed to amend the Penal Code to make punishment for such crimes stiffer.³⁶ The National Judicial Council (NJC), Nigeria's apex judicial disciplinary organ, also weighed in and suspended the trial judge for one year without pay, on the ground that he did not exercise his discretion 'judicially and judiciously'.³⁷

The above illustrations portray the legal concerns that this research addresses. The first illustration depicts how penal statutes fail to measure offence gravity and prescribe

³² ₦100 is less than R10 or US\$1.

³³ This is the punishment that would be imposed for theft to the value of more than N100, or where the theft is committed outside a building or dwelling house. Under some circumstances in the code, sentence could be up to seven years' imprisonment, with or without fine. See ss 287 and 288 of the Penal Code; see also Mariam Ishaku Gwangdi & Sule Musa Tagi *The Law on Armed Robbery, Theft and Housebreaking in Nigeria: A Survey of Adamawa, Borno, Taraba and Yobe States* (2012) 39-42.

³⁴ See Economic and Financial Crimes Commission 'N32.8 bn police pension scam: efcc kicks as court sentences John Yusufu to 6 years imprisonment' 28 January 2013 available at <https://efccnigeria.org/efcc/index.php/news/293-n32-8-bn-police-pension-scam-efcc-kicks-as-court-sentences-john-yusufu-to-6-years-imprisonment>, accessed on 3 January 2015. The Punch Newspaper 'N27bn pension thief rearrested after outcry' 30 January 2013 available at <http://www.punchng.com/news/n27bn-pension-thief-rearrested-after-outcry/>, accessed 15 March 2014; The Sun 'EFCC re-arrests convicted pension director ... faces another N300m fraud charges today' 30 January 2013 available at <http://sunnewsonline.com/new/?p=16857>, accessed 15 March 2014. Mr Yusufu was in fact subsequently arraigned on fresh fraud charges. See Economic and Financial Crimes Commission 'Police pension: EFCC arraigns Yusufu over N250 million fraud' 30 January 2013 available at <https://efccnigeria.org/efcc/index.php/news/294-police-pension-efcc-arraigns-yusufu-over-n250-million-fraud>, accessed 3 January 2015.

³⁵ Nigeria's lower house in the National Parliament is called the House of Representatives.

³⁶ Vanguard Newspaper 'Police pension scam: Reps ask EFCC, AGF to appeal judgment' 30 January 2013 available at <http://www.vanguardngr.com/2013/01/police-pension-scam-reps-ask-efcc-agf-to-appeal-judgment/>, accessed 15 March 2014; Policy and Legal Advocacy Centre 'Police pension scam: Reps decry judgment on Mr. John Yakubu Yusuf, resolves to amend the Penal Code Law' available at http://www.placng.org/new/main_story.php?sn=22, accessed 15 March 2014.

³⁷ See National Judicial Council 'Press release' 26 April 2013, available at <http://njc.gov.ng/news.php>, accessed 15 March 2014; see also Daily Trust Newspaper 'Rise and fall of Justice Talba 30 April 201) available at <http://www.dailytrust.com.ng/daily/old/index.php/law/53309-rise-and-fall-of-justice-talba>, accessed 15 March 2014. In reality, even if the trial judge exercised discretion judicially and judiciously, he could not have imposed more than two-year imprisonment as prescribed by law. Some may still consider that to be disproportionately lenient.

commensurate penalties. The second illustration describes how judicial sentencing may also fail to reflect offence gravity. Upon closer examination however, both illustrations show what sentencing legislation and decisions fail to achieve. Succinctly, the failure can be stated as follows: neither statutory penalties nor judicial discretion in sentencing ensures proportionate allocation of punishments in Nigeria. This failure persists and frequently results in grossly disproportionate and inconsistent sentences. Grossly disproportionate sentences, according to Van Zyl Smit and Ashworth,³⁸ offer a basis for urgent reforms because they foster serious breaches of human rights. In the Nigerian context, this thesis will argue that constitutional breaches occur because, among other things, there are neither salient provisions within the Constitution nor a well-articulated principle of proportionality that regulates sentencing legislation and discretion in Nigeria.

1.3 Research Question

This research study will seek answers to the following question:

What measures, within the context of Nigeria's legal system, are necessary to ensure that sentencers integrate proportionality principles in sentencing and avoid imposing penalties that infringe constitutional rights?

To answer this question, the thesis will consider the following sub questions:

1. Should a dominant principle or principles underline the choice of sentence?
2. Does sentencing practice in Nigeria reflect a dominant principle or principles?
3. If it does, are there deficits in the application of such principle or principles in Nigeria?
4. What, in the event of a negative response to question 2, or a positive response to question 3, should the fundamentals of a model sentencing policy framework for Nigeria look like?

1.4 Research Justification

This research is warranted for a number of reasons. First, sentencing is an important subject because it involves resolving the degree to which an offender's rights may be curtailed by the

³⁸ Dirk van Zyl Smit & Andrew Ashworth 'Disproportionate sentences as human rights violations' (2004) Vol. 67 No. 4 *The Modern Law Review* 541-560.

state. Criminal sanctions invariably impact constitutionally protected rights, especially the rights to life, liberty and human dignity. This suggests that rights, or more accurately, some rights, are not absolute. In Nigeria, the rights to life and liberty may be curtailed by lawful judicial order.³⁹ Under the South African Constitution, the rights to respect for human dignity,⁴⁰ to life,⁴¹ and ‘not to be treated or punished in a cruel, inhuman and degrading way’ are ‘non-derogable’.⁴² Under the 1999 Constitution of the Federal Republic of Nigeria, however, the scope or content of equivalent protections for human dignity seems to be unclear. Unlike the South African Constitution, the Nigerian Constitution does not specifically prohibit cruel, inhuman or degrading punishments. Besides, although it recognises the death penalty, it offers no standard for ensuring that imposing the penalty meets basic proportionality principles. This observation extends to other statutory punishments in Nigeria. It will be asserted in this thesis that penal statutes in Nigeria lean towards excessive penal severity because the Constitution does not establish a clear standard against cruel, inhuman or degrading punishment, or against grossly disproportionate sentences. Excessive severity has serious repercussions for the rights of offenders.

The array of available literature on punishment informs this researcher’s view that the constitutional lacuna presented above has not yet been made the subject of sentencing research in Nigeria, or that no attention has been given to the dilemma it presents. Although studies acknowledge the excessively punitive and incarcerative nature of statutory penalties, as well as the questionable deterrence value of incarceration,⁴³ they neither discuss sentencing extensively from the standpoint of constitutionality and proportionality, nor offer any useful prognoses of how the failure to inject these values into punishment contributes to sentencing problems in a

³⁹ The 1999 Constitution protects the rights to life and liberty in ss 33(1) and 35(1) respectively.

⁴⁰ Section 10 of the Constitution of the Republic of South Africa 1996.

⁴¹ Ibid at s 11.

⁴² Ibid at s 12. See also the Table of Non-Derogable Rights in the Constitution. See further *S v Makwanyane* 1995 (2) SACR 1 (CC) at 41 paras C-E, where South Africa’s Constitutional Court interpreted the constitutional protection for human dignity in the context of punishment.

⁴³ See Roger G Hood & Carolyn Hoyle *The Death Penalty: A Worldwide Perspective* (2008) 328-329. The authors rely on research by AA Adeyemi ‘Death penalty: Criminological perspectives. The Nigerian situation’ (1987) 58 *Revue Internationale de Droit Penal* 485, and a Report of the National Study Group on Death Penalty, Abuja, 2004, which reviewed evidence that the death penalty lacks deterrent effect.

post-colonial Nigerian society that is governed by a Constitution that contains a Bill of Rights.⁴⁴ Debates on the constitutionality of punishments in Nigeria have only touched on what has been satirised as the contradiction in the Constitution's guarantee of the right to life and its recognition of the death penalty.⁴⁵ This research will maintain that such debates⁴⁶ wrongly assume that the prohibition of 'torture, cruel and degrading treatment' by s 34(1)(a) of Nigeria's 1999 Constitution applies to judicial punishments that fit the 'cruel' and 'degrading' epithets. They are wrong because they are founded on flawed jurisprudence: it is not as clear that the Constitution prohibits cruel, inhuman or degrading punishments as do some other national Constitutions. To assume that it does may be misleading, as the assumption cannot be supported by the history of constitutional provisions regarding protections for human dignity in Nigeria.

A probable legal consequence of this constitutional vacuum is that it fosters a presumption that judicial sentences are constitutional when they give effect to the clear intent of statutorily prescribed penalties. That this presumption precludes judicial evaluation of the constitutionality and proportionality of statutory punishments is implicit in the views that the Supreme Court held in *Joseph Amoshima v The State*,⁴⁷ that where the legislature has imposed a mandatory sentence for a crime, it is consistent with the obligation of the court under the doctrine of separation of powers to impose that sentence. In other words, it is not open to the court to question the constitutionality or proportionality of a penalty that has been duly enacted by parliament. Also, in *Umoh Ekpo v The State*,⁴⁸ which was decided in June 2014, the relative

⁴⁴ Though not called a Bill of Rights, Chapter 4 of the 1999 Constitution spells out the fundamental human rights that are enforceable in Nigeria.

⁴⁵ Onyekachi Wisdom Ceazer Duru 'The constitutionality of the death penalty under Nigerian law' (2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142981, accessed 25 March 2014.

⁴⁶ Ibid. However, the constitutionality of the penalty has been consistently upheld by the Supreme Court of Nigeria. In *Okoro v State* (1998) 14 NWLR 584 the Supreme Court upheld the constitutionality of the penalty and the method of executing it. See Oluyemisi Bamgbose 'Towards the global abolition of the death penalty: Comparing the criminal laws in the United States of America and Nigeria' (2007) Vol. 13 Issue 1 *East African Journal of Peace and Human Rights* 30 at 37-39; the author presumed that a right not to be subjected to torture, inhuman and degrading punishment was protected under the Nigerian constitution. Essentially, she relied on Supreme Court of Nigeria decisions, such as *Kalu v State* [1998] 13 NWLR 531, where the court declined 'to consider whether the death penalty violated the right not to be subjected to torture or inhuman or degrading punishment'. However, the 1979 Constitution under which the decision was considered only prohibited 'torture, inhuman or degrading treatment'. Chapter 4 addresses any presumption that this prohibition extends to judicial punishment.

⁴⁷ (2011) LPELR-SC.283/2009.

⁴⁸ LER[2014] CA/L/96/11 The accused person was 28 years old when he robbed his victim using a pair of pliers, pretending it was a gun. The court found that the pliers was an obnoxious weapon under the relevant statute and

youth of the offender, his potential for reform, the relatively small value of the stolen items, the fact that the weapon used – a pair of pliers – though offensive, was not inherently lethal and that no life was taken, prompted the court to fleetingly consider the appropriateness of imposing the death sentence in the case. However, considering itself to be bound by the statutory penalty, the court went on to uphold the death sentence that was imposed by the lower court. This rather restrictive judicial outlook on the separation of powers doctrine within Nigeria's constitutional scheme imposes a duty on courts to pass sentences that may be so severe and offensive to important constitutional or proportionality principles.

This leads to the second reason for the research. Judges need the aid of lucid, regulating constitutional principles and a system of guidelines to achieve proportionate sentencing. To some degree, the absence of such guidelines may also be attributed to inadequate research on sentencing in Nigeria. Imposing sentences without clear guidelines has been detrimental, resulting in criticisms that sentencing is 'incoherent', 'irrational' and 'perhaps the most confused area of criminal legislation'.⁴⁹ Nigeria's sentencing landscape portrays an 'incredibly intricate variety of sentences [that are] legally pronounced by different Courts exercising the same jurisdiction in respect of the same or similar offences'.⁵⁰ It has also been described as chaotic and lacking uniformity, clear principles or guiding policies⁵¹ or as having its basis not in merits, but in the incomprehensible temperaments of judges.⁵² Although attempts have been made through case law to develop principles to regulate the mitigation or aggravation of sentence,⁵³ the principles are a rough and imprecise guide. As this thesis will illustrate with the aid of recent judicial pronouncements, the above depictions of Nigeria's sentencing scheme still hold true, underlined by criminal statutes that ensure that sentencing is exclusively the function of judges,

proceeded to impose the death sentence on the accused person. The total value of the possessions that were stolen was N17, 210. This amounts to about R1, 145 or US\$102 by current exchange rates.

⁴⁹ See A Fatayi-Williams 'Sentencing processes, practice and attitudes: As seen by an Appeal Court judge', in TO Elias (ed) *The Nigerian Magistrate and the Offender* (1972) 29-38 at 33.

⁵⁰ Ibid.

⁵¹ CO Okwonkwo 'Sentencing' in EI Nwogugu (ed) *Current Legal Problems in Nigeria: Proceedings of the Anambra State Law Conference, 1986* (1988) 154-171 at 157.

⁵² J Nnamdi Aduba 'Some mitigating and aggravating factors in Nigerian sentencing practice' (Undated) available at <http://www.researchgate.net/publication/40439860>, accessed 5 January 2014; see also LO Fadipe 'Sentencing processes, practices and attitudes: As seen by a magistrate and customary court judge' in TO Elias (ed) *The Nigerian magistrate and the offender* (1972) 39-48 at 41-42, 45-47; See also Atsenuwa op cit note 1 at 91-93 but see also 94-104.

⁵³ See section 5.7 below.

who must implement penal prescriptions without the aid of a lucid sentencing policy.⁵⁴ It is not uncommon that judges do not offer reasons for the sentences they impose. In the 2014 case of *Anthony Omoruyi v The State*,⁵⁵ the Court of Appeal overturned a conviction and death sentence for murder, returning instead a conviction for manslaughter, which carried a sentence of life imprisonment. The court imposed a sentence of 20 years instead, without offering any more reasons than the following statement:

Hence, in the circumstances, therefore, having allowed the appeal in part, the verdict of guilty for murder and the sentence of death by hanging passed upon the Appellant by the court below are hereby set aside and a verdict of manslaughter and a sentence of twenty (20) years imprisonment are hereby substituted therefor. The sentence shall run from the July 15, 2009, the date the Appellant was convicted and sentenced by the lower court in question.

This, unfortunately, tends to be the norm, a norm that apparently compelled the Supreme Court of Nigeria in its 2011 decision in *Ndewenu Posu & Anor v The State*,⁵⁶ to remark per Adekeye JSC, that ‘the sentencing policy of judicial officers need to be revisited’. No portion of the sentence in the *Omoruyi* case was devoted to explaining why the court thought 20 years’ imprisonment was the appropriate sentence. No aggravating or mitigating circumstances, or principles or objects of sentencing were evaluated. The sentence points to a widely discretionary judicial fiat. The only mitigation in the judgment, was the defence of provocation which changed the conviction from murder punishable by death, to manslaughter punishable by life imprisonment. Having convicted the appellant of manslaughter however, no reasons whatsoever were given for further mitigating the sentence.

Considering that between 64-72 per cent of Nigeria’s prison population await trial, it could be argued that pre-trial detention is the obvious problem that needs to be addressed in Nigeria’s criminal justice process. Indeed, the sheer size of the detainee population in Nigerian prisons and the problems this poses have already earned the dilemma considerable attention in scholarly discourse and in recent criminal justice reforms in the country, so much so that there is

⁵⁴ Alan Milner *The Nigerian Penal System* (1972) 54.

⁵⁵ LR-e-LR/2014/18.

⁵⁶ 2011 Legalpedia SC NBIW.

probably little else can be said about it that will be new.⁵⁷ On the other hand, far less attention has been given to the problems associated with custodial sentencing. It is partly this that informs the focus of this thesis on sentencing. But there is yet a more compelling reason: every awaiting trial detainee faces the prospect of being subjected to a sentencing process that does not guarantee that he or she will be sentenced proportionately, in a manner most consistent with his rights as an offender. This, and the fact that the subject has received little attention from policy makers, judges and academia, offer further reasons for this research.

Coldham⁵⁸ has observed that the lack of attention to criminal justice reforms in Nigeria is striking, especially in the light of far reaching legal reforms in other sectors of the economy. Although he rightly blames the lack of ‘official interest ... on the paucity of research in the field’,⁵⁹ another reason may be that policy makers have not conceived penal reforms as an economically viable course of action. Criminals are seen as a burden to society, a threat to be incapacitated. Consequently, the processes and institutions of penal justice in Nigeria have only functioned as a system for warehousing offenders.⁶⁰ Beyond the rhetoric of reforms, Nigeria’s penal system has never seriously been organised with a view to reforming offenders but rather to furthering the aims of retribution, deterrence or incapacitation.⁶¹ However, while incarceration may offer immediate utility by removing perceived threats for periods of time, overusing it is significantly more costly, both economically and socially.

The costs of imprisonment have been much debated world over. First, it exacts a prohibitive toll on the taxpayer, on correctional services, on family income and relations and on

⁵⁷ For example, bail and pretrial detention reform were given considerable attention in the new Lagos State Administration of Criminal Justice Law 2011. For scholarly material on the subject, see Atsenuwa op cit note 1; Agomoh op cit note 7; Aduba & Alemika op cit note 12.

⁵⁸ Simon Coldham ‘Criminal justice policies in Commonwealth Africa: Trends and prospects’ (2000) Vol. 44 *Journal of African Law*, 218-238 at 223.

⁵⁹ Ibid.

⁶⁰ Johnson Olusegun Ajayi ‘Nigeria Prisons and the dispensation of justice’ (2012) Vol. 1 Issue 3 *AFFREV IJAH* 208 at 221; Alemika and Chukwuma, writing in the context of juvenile justice administration, blamed warehousing in Nigerian prisons on ‘policy defects, inadequate funding, incoherent and punitive programmes...’ See EEO Alemika & IC Chukwuma *Juvenile Justice Administration in Nigeria: Philosophy and Practice* (2001) 16 & 62; Innocent Chukwuma ‘Nigeria: Social structure, criminal justice and criminology’ in Cindy J Smith, Sheldon X Zhang & Rosemary Barberet (eds) *Routledge International Handbook of Criminology* (2011) 463 at 445-446.

⁶¹ Underlying penal attitudes generally support harsh incarcerative regimes in the misguided belief that such treatment would deter or reform, even when no rehabilitative programmes are provided for prisoners. See generally, Ikuteyijo Lanre Olusegun & Agunbiade Ojo Melvin ‘The evolution and social dynamics of prisons in Nigeria’ in K Jaishankar *International Perspectives on Crime and Justice* (2009) 690-710.

the individual offender. Secondly, it weakens the fabric of society, reduces employability, drives up unemployment rates and hinders economic growth.⁶² Its value as a crime deterrent has also been seriously challenged: available evidence does not conclusively support the claim that incarceration deters crime.⁶³ Adeyemi poignantly described the costs of incarceration as ‘[lacking] both deterrent and reformatory value, [as] immensely costly to the economy... physiologically, psychologically, and emotionally destructive ... socially damaging ... culturally abhorrent and penologically disastrous’.⁶⁴ However, despite research emphasising these problems,⁶⁵ Nigeria continues to embrace incarceration as a first-line remedy. This suggests an enduring need to persuade policy makers that sentencing reforms are a viable and achievable goal to pursue, both from an economic and sociological standpoint.

There are indeed good reasons for policy makers to reconsider the criminal justice system’s excessive use of incarceration: on the one hand, studies have shown that there is no

⁶² Todd R Clear *Imprisoning Communities: How Mass Incarceration makes Disadvantaged Neighbourhoods Worse* (2007) ch 1. Although the relationship between crime, employment and incarceration can be difficult to clarify or detangle, most research agree that incarceration (especially when the rates are high) negatively impacts economic and social relations, especially among low income groups. Prison has been noted to exacerbate social inequities. See Richard B Freeman ‘Crime and the job market’ (1994) *NBER Working Paper No. 4910* at 23-24 & 27; Bruce Western & Becky Pettit ‘Incarceration and social inequity’ (2010) Vol. 139(3) *Daedalus* 8; Harold Watts & Demetra Smith Nightingale ‘Adding it up: The economic impact of incarceration on individuals, families and communities’ (1996) Vol. 3 *Journal of Oklahoma Criminal Justice Research Consortium* 55.

⁶³ Valerie Wright ‘Deterrence in criminal justice: Evaluating certainty vs. severity of punishment’ (2010) available at <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>, accessed 24 March 2014. Citing various researches, Wright argues that severity does not deter offenders, but that deterrence is enhanced by the certainty of punishment. Deterrence may also be attributed to extra-legal factors, such as the fear of family or peer disapproval, social stigma, shame, etc, rather than to punishment itself. See generally Daniel S Nagin & Greg Pogarsky ‘Integrating celerity, impulsivity and extralegal sanction threats into a model of general deterrence: Theory and evidence’ (2001) Vol. 39 *Criminology* 855, but see particularly 866-870, 873-884; Robert Apel & Daniel S Nagin ‘General deterrence: A review of recent evidence’ in James Q Wilson & Joan Petersilia (eds) *Crime and Public Policy* (2011) 411 at 413-416.

⁶⁴ Adedokun A Adeyemi ‘The problem of imprisonment in the Nigerian penal system’ in Ademola O Popoola & Ebenezer OI Adodo (eds) *Current Legal Developments in Nigeria: Essays in Memory of Professor J.D. Ojo* (2007) 23. Adeyemi’s view about the culturally abhorrent nature of incarceration supports arguments that imprisonment is alien to African societies and conceptually opposed to the principles of restorative justice that underpins African notions regarding criminal justice. See Oko O Elechi ‘The Igbo indigenous justice system’ in Saleh-Hanna, Viviane (ed) *Colonial Systems of Control: Criminal Justice in Nigeria* (2008) ch 20; see also Nigerian Law Reform Commission op cit note 3 at 13, 29-37. According to 2014 budget proposals, N47.520bn was proposed for the Nigerian Prisons Service. Of this, N38.184 was allocated to personnel costs and N2.310bn to capital expenditure. N5.287bn was proposed for food supplies and catering materials (for roughly 55,000 prison inmates). The year before, total allocations were N50.161bn, indicating a fall of about N2.641bn in the proposed budget for 2014. See Federal Government of Nigeria ‘Summary by MDAs: 2014 FGN budget proposal’ available at http://www.budgetoffice.gov.ng/2014_budget_proposals/20.%20Summary_Interior.pdf, accessed 24 March 2013; Federal Government of Nigeria ‘2013 budget’ available at http://www.budgetoffice.gov.ng/2013-budget_details/20.%20Summary_Interior.pdf, accessed 24 March 2014.

⁶⁵ See for example, National Human Rights Commission *The State of Human Rights in Nigeria 2007* (2007) ch 4.

conclusive evidence the harsh sentences or incarcerative penal regimes have a deterrent value, that they do not enhance public safety, and that imprisonment increases public safety expense.⁶⁶ According to available evidence, alternatives to prison sentences are less expensive. In the United States of America for example, each imprisoned non-violent offender that is moved into a probation or parole programme saves the correctional system between US\$23,000 and US\$25,000 per annum.⁶⁷ Such potential savings for Nigeria's developing economy could prove beneficial.⁶⁸ Of course, while it is not the aim of this research to dwell on the socio-economic ramifications of a failing penal system, it is pertinent to point them out.⁶⁹

Prolonged delays in implementing the recommendations of various commissions of enquiry into criminal justice reforms provide yet another reason for this research. In 2005 and 2006 respectively, a National Working Group on the Reform of Criminal Justice Administration and a Presidential Commission on Reform of the Administration of Justice in Nigeria pinpointed regulatory and structural deficiencies in the sentencing system. They recommended a flexible but uniform sentencing framework that balanced public security concerns with protecting victim's

⁶⁶ Wright op cit note 60 at 6-9, see also discussion in section 2.4.1.2.

⁶⁷ John Schmitt, Kris Warner & Sarika Gupta 'High budgetary cost of incarceration' (2010) 10-12 available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>, accessed 24 March 2013.

⁶⁸ Incidentally, the government of Nigeria has acknowledged the need for reforms in this area. In 1980, it acknowledged that justice administrators were barely utilising probationary sentences, even though evidence suggested that about 40 per cent of offenders met the statutory criteria for probationary sentences. It attributed the reason to the 'colonial heritage and training of our justice administrators, their belief in deterrence, and their tendency to take the path of least resistance (i.e. imprisonment and/or fine)'. Other reasons the government provided include the dangerous offender, lack of trained staff, public insistence on prosecution and the challenges of carrying out penal code reforms. It also identified a 'lack of any long standing "tradition" for research and professional competence to "guide" social policy', and 'government's concern with, and concentration on, the technical and economic aspects of development and the resignation of social problems to "sermonisation" and "traditional" institutions that are no longer viable for such purposes', as obstacles. See Government of the Federal Republic of Nigeria 'Crime and the quality of life in Nigeria' (1980) The Nigerian National Paper for the Sixth United Nations Congress on Crime Prevention and Treatment of Offenders, holding at Caracas, Venezuela August 25 to September 5, 1980, 46-47.

⁶⁹ The economic costs of Nigeria's imprisonment was the subject of a paper by Yahaya Abdulkarim 'An analysis of Socio-Economic Impact of Imprisonment in Nigeria (2012) Vol. 2 No. 9 *Developing Country Studies* 148 at 151-152. The author drew attention to the fiscal burden it creates, but also to other social costs that may have economic dimensions. These include the impact of imprisonment on an ex-offender's income and employability, the impact on poor families, on the stability of the family unit and of social relationships. It may well be that some considerable portion of these costs may be eliminated if Nigeria's pre-trial detention system is overhauled to ensure that offenders are processed through the criminal justice system expeditiously. However, even when this is achieved, Nigeria will still find itself saddled with a significant cost burden under its current prison management system. This is because as research has suggested, the legal status of pre-trial detainees makes them a secondary factor when budgeting for prisons. They tend not to be 'provided ... the basic needs to which convicted prisoners have access.' See Aduba & Alemika op cit note 12 at 103.

interests and suspect's rights, enhanced proportionality, consistency and deterrence, strengthened restorative elements in criminal justice and promoted a range of sentencing options that reserved prison sentences for very serious offenders.⁷⁰ In 2006, these recommendations were included in legislative bills⁷¹ that have not yet been passed by parliament.⁷² Pertinently, the recommendations are important statements of general principles or goals that should underpin a new sentencing policy and framework. This thesis examines how the principles can be achieved.

Lastly, this thesis is necessitated by the dilemma of the plurality of penal systems in Nigeria,⁷³ which creates different standards regarding punishment. There are two principal codes in the country, which define and stipulate penalties for criminal conduct. The Criminal Code Act⁷⁴ applies to Southern Nigeria while the Penal Code⁷⁵ applies in the North. These are complimented by two principal criminal procedure statutes, namely the Criminal Procedure Act⁷⁶ for Southern Nigeria and the Criminal Procedure Code Law of 1960, for Northern Nigeria. These statutes differ in a number of respects,⁷⁷ but operate as uniform statutes in their respective territories. However, some states have their own penal codes which may reflect slight to major

⁷⁰ Presidential Commission on Reform of the Administration of Justice in Nigeria *Proposals for Reform of the Administration of Justice in Nigeria* (2006) 62-63, 120-121, 180, 238; see also First Report of the National Working Group on the Reform of Criminal Justice Administration (2005). The Administration of Criminal Justice Bill recommended by this report proposes a uniform criminal procedure law for Nigeria.

⁷¹ Critical among these bills include the Community Service Bill 2006 which introduces community sentences for minor offences, the Criminal Justice (Victim's Remedies) Bill 2006, which promotes restorative elements of justice, and the Administration of Criminal Justice Bill which harmonizes criminal procedure law and introduces elements that potentially check abuses in sentencing.

⁷² Alewo Musa John Agbonika 'Delay in the administration of criminal justice in Nigeria: Issues from a Nigerian view point' (2014) Vol. 26 *Journal of Law, Policy and Globalization* 130-138.

⁷³ Amnesty International 'The death penalty and women under the Nigeria penal systems' (undated) 4-5 available at <http://www.amnesty.org/en/library/asset/AFR44/001/2004/en/071a7428-d64e-11dd-ab95-a13b602c0642/afr440012004en.pdf>, accessed 26 March 2014.

⁷⁴ Cap C38 Laws of the Federation of Nigeria 2004.

⁷⁵ Cap 30 Laws of Northern Nigeria 1963.

⁷⁶ Cap C41 Laws of the Federation of Nigeria 2004.

⁷⁷ For example, while the Criminal Code defines murder, corresponding provisions in the Penal Code define culpable homicide, with greater detail and clarity. Further, ss 387-389 of the Penal Code criminalise adultery but the Criminal Code does not. The Penal Code also prescribes punishments that are not recognised under the Criminal Code, such as haddi lashing, which is a Muslim form of corporal punishment. These and other examples of divergence have informed calls for a unified code for Nigeria. See Charles Mwalimu *The Nigerian legal system: Public law, Volume 1* (2007) 505-506; see also Nigerian Institute of Advanced Legal Studies 'Proposed unification of criminal laws of Nigeria' available at [file:///G:/Thesis/Chapter%201/unification%20of%20the%20criminal%20law%20and%20penal%20code%20\(1\).pdf](file:///G:/Thesis/Chapter%201/unification%20of%20the%20criminal%20law%20and%20penal%20code%20(1).pdf), accessed 26 March 2014.

differences.⁷⁸ Added to the challenge that arises from this is the introduction of sharia penal codes in parts of Northern Nigeria. These codes increase the number of offences that are punishable by death or by corporal punishment.⁷⁹ They also introduce other offences, sanctions and standards of proof that are peculiar to sharia.⁸⁰ Besides complicating penal pluralism in Nigeria, sharia introduces levels of penal severity that imperil human rights safeguards. Advocating some measure of uniformity amidst the plurality of penal laws in Nigeria – to the extent that it enhances sentencing reform – lies at the heart of this research.

Overall, this thesis embarks on research in an area that is largely neglected in penal discourses in Nigeria. This neglect has been reiterated in this chapter to emphasise the astonishing dearth of jurisprudence on principled sentencing in Nigeria. The limited resources on sentencing in Nigeria suggests a pretty chaotic trail in the country's sentencing practice, and while it certainly is a positive development that judges admit this problem,⁸¹ little attention has been given to resolving it. As with the abovementioned *Amoshima* and *Ekpo* cases⁸² decided in 2012 and 2014 respectively, courts have repeatedly overlooked opportunities to found their approach to sentencing on a rationalised basis that infuses punishment with principles that enhance human rights guarantees against excessive penal severity. Coldham's⁸³ allusion to scant research in this field in Nigeria reiterates a knowledge gap in Nigeria's sentencing jurisprudence and practice that needs to be filled.⁸⁴ This, the importance of the subject, and the fact that rights bearing individuals continue to be subjected to the abuses and inadequacies of the current system, highlight the importance of this thesis. The thesis seeks to make a contribution that rekindles interest in discourses about principled sentencing in Nigeria. It proposes to do so by

⁷⁸ Most states in Nigeria have adopted their own Penal or Criminal Codes, which were similar to the principal codes. In 2007 however, Lagos state adopted the Administration of Criminal Justice Law, which repealed the erstwhile criminal procedure law and introduced substantial changes to criminal law and procedure. See Peter A Anyebe 'Sentencing in criminal cases in Nigeria and the case for paradigmatic shifts' Vol. 1 (2011) *NIALS Journal on Criminal Law and Justice* 151 – 153. Subsequently, the 2007 law was replaced by the Administration of Criminal Justice Law 2011.

⁷⁹Carina Tertsakian "'Political Shari'a'?" Human rights and Islamic law in northern Nigeria' (2004) Vol. 16 No 9(A) *Human Rights Watch* 1-111 at 37-38, 99-102.

⁸⁰ Rudd Peters 'The reintroduction of Islamic criminal law in Northern Nigeria' (2001) being a study conducted on behalf of the European Commission, available at http://rezaei.typepad.com/hassan_rezaei/files/islamic-criminal-law-nigeria_en.pdf, accessed 26 March 2014.

⁸¹ See Fatayi-Williams op cit at note 49 op cit.

⁸² See notes 47 and 48.

⁸³ Coldham op cit note 57.

⁸⁴ See discussion about the knowledge gap in chapter 2 section 3.

attempting to fill the jurisprudential gap and to propose a structured or principled approach to sentencing.

1.5 Research Methodology

How sentencers in Nigeria exercise discretion when interpreting sentencing legislation is crucial to this research. Since sentencing power derives from the common law or from constitutional and statutory provisions, the research will examine how these sources of law influence sentencing. The research questions have been framed to explore this influence and to usher the enquiry into an extensive doctrinal and comparative review of sentencing in South Africa, England and Wales and Nigeria. Doctrinal research entails expositions of legal concepts and principles, through analyses of the interactions between rules, legislation and case law. It has also been described as a core method of legal research that requires the critical, rigorous and creative processes involved in legal reasoning.⁸⁵

This research employs the deductive method of doctrinal research to analyse the adequacy of regulatory frameworks for sentencing and to evaluate judicial compliance with the rules and principles that have evolved to guide sentencing discretion. The aim is to determine how or whether judicial compliance fulfils the penal policy considerations that underlie sentencing legislation. The research is also reform-oriented, in the sense that it seeks to unveil inadequacies in extant sentencing policy and legislation and how these impact sentencing discretion, so that recommendations for reforms can be made. The law in context paradigm summarises this approach; it describes analyses that utilise practical illustrations to portray the social context within which the law operates. It portrays the problems that arise from the application of the law and the legal challenges arising therefrom (i.e., within specific social contexts).⁸⁶ In chapters one and two, the law in context paradigm is utilised to portray policy

⁸⁵ Terry Hutchinson & Nigel Duncan 'Defining and describing what we do: Doctrinal legal research' (2012) Vol. 17 No. 1 *Deakin Law Review* 83 at 84 -85. The authors rely on definitions that describe doctrines as a '[a] synthesis of various rules, principles, norms, interpretative guidelines and values'. The doctrinal method is an attempt to elucidate or justify a rule of law, which having evolved through a gradual organic process, is meant to be applied on a consistent basis.

⁸⁶ For an explanation of the law in context method, see Philip Selznick 'Law in context' revisited' (2003) Vol. 30 No. 2 *Journal of Law and Society* 177-186.

changes and the need for reforms. Going forward, the dissertation will examine the features, interactions and limitations in sentencing law and how these impact sentencing discretion.⁸⁷

Doctrinal analysis will also be deployed within a comparative component that aims to enhance an understanding of sentencing across different legal systems. A basis for this comparative approach can be found in Okeke's⁸⁸ and Eberle's⁸⁹ comments, which describe the comparative legal research method as allowing juxtapositions of similarities and dissimilarities between legal systems, in order to explore historical and doctrinal dimensions in the law, so as to enhance an understanding of the role of law in different national contexts, or facilitate the replication of the best attributes of one legal system by another. Comparative law therefore involves an 'analysis, differentiation, and assessment of [different] legal systems,'⁹⁰ of the interactions between legal systems and how they influence each other. Kahn-Freund⁹¹ identified three purposes for deploying the comparative law method: first, the method facilitates 'international unification of the law'; secondly, it gives 'adequate legal effect to a social change shared by a foreign country with one's own country'; and thirdly, it '[promotes] at home a social change which foreign law is designed either to express or to produce'.⁹²

Kahn-Freund's aims suggest that legal transplantation is possible, though he warned that not all forms of legal arrangements are transplantable, due to social, environmental and political factors. Using labour relations as an example, he pointed out that 'standards of individual protection' in relations between employers and employees – such as are expressed in substantive laws regarding workplace safety, wages, health, leave, pension and the rights to associate and bargain collectively among others – are readily amenable to transplantation. These fall within the sphere of individual labour law and are often expressed strictly as substantive law. Conversely,

⁸⁷ See Hutchinson & Duncan op cit note 84 at 101-113. For further discussion on methods of legal reasoning, see Chynoweth, Paul 'Legal research' in Knight, Andrew and Ruddock, Les (eds) *Advanced research methods in the built environment* (2008).

⁸⁸ Chris Nwachukwu Okeke 'Methodological approaches to comparative legal studies in Africa' (2012) being a paper presented at the inaugural methodology workshop organised by The Centre for Comparative Law in Africa (CCLA) Faculty of Law, 22nd – 24th October 2012 at the Oliver Tambo Moot Court, Kramer Law Building, University of Cape Town, South Africa, 1-3; Chris Nwachukwu Okeke 'African law in comparative law: Does comparativism have worth?' (2011) Vol. 16 No 1 *Roger Williams U. L. Rev.* 1 at 5-6.

⁸⁹ Edward J Eberle 'The methodology of comparative law' (2011) Vol. 16 *Roger Williams U. L. Rev.* 51.

⁹⁰ Okeke (2012) op cit note 87.

⁹¹ O Kahn-Freund 'On uses and misuses of comparative law' (1974) Vol. 37 No. 1 *The Modern Law Review* 1 at 2.

⁹² Ibid at 5-6.

standards or rules that define relationships between organised interests resist transplantation. These rules define power relations between institutions and the interests they represent. As such, they are (national) context specific. In labour relations, the rules specify obligations regarding the promotion of collective bargaining, relations between trade unions and employers and strikes⁹³ – issues that raise the ‘problem of how far one can transplant institutions closely linked with the structure and organisation of political and social power in their own environment’.⁹⁴

In the context of Nigeria’s criminal law, there have been objections to the transplantation of English criminal law concepts and institutions, based on the obliterating effect that they had on African customary criminal law.⁹⁵ This research acknowledges that the objections are real and that the problems that Kahn-Freund warned of are ever present. For instance, questions about how to measure sentence severity can be particularly context specific, depending on how each society defines criminal conduct, regulates and places value on punishment and how much human suffering a society can tolerate. However, though countries may differ in their responses to these questions, the usefulness of a comparative analysis of contemporary sentencing systems is not diminished thereby. Such analysis is necessary for understanding how criminal justice systems evolve or work in the context of cultures, differentiating and highlighting those experiences that can be shared, for the purpose of enhancing reforms or reducing disparities between penal systems, as may be necessary.

Hence, while this research is not oblivious of the ‘dangers’ of transplantation or harmonisation, it is keenly aware of evolving international and regional instruments that influence or are being influenced by national sentencing standards. For example, article 7 of the 1966 International Convention on Civil and Political Rights, article 5 of the 1982 African Charter on Human and People’s Rights and article 3 of the 1950 European Convention on Human Rights, all prohibit torture, cruel, inhuman or degrading treatment or punishment in member States. In Resolution 8/8, the United Nations Human Rights Council recalled that ‘a

⁹³ Ibid at 20-24.

⁹⁴ Ibid at 24.

⁹⁵ See Karibi-Whyte, *AG History and Sources of Nigerian Criminal Law* (1993) 64-65, 67; Karibi-Whyte, *AG Criminal policy: Modern and traditional trends* (1988) 25, 45; see also Viviane Saleh-Hanna ‘Alternative to imprisonment: community service orders in Africa’ in Viviane Saheh-Hanna (ed) *Colonial Systems of Control: Criminal Justice in Nigeria* (2007).

number of international, regional and domestic courts have held the prohibition of cruel, inhuman or degrading treatment or punishment to be customary international law'.⁹⁶ Also, under the Treaty on the European Union, member States are obligated to foster cooperation in fulfilling treaty obligations.⁹⁷ This obligation extends to state organs, such as the Sentencing Council of England and Wales, a statutory body under English law.⁹⁸ Of particular interest to the current discussion are the influences that European and England and Wales's⁹⁹ sentencing standards have had on each other. According to Baker,¹⁰⁰ there is a 'degree of correspondence' between penalties in UK's Sexual Offences Act 2003 (and the sentencing guidelines prepared thereunder) and penalties proposed by the Union's Child Pornography Directive. Consistent with these degrees of correspondence, Nelken¹⁰¹ noted the 'difficulties of drawing boundaries between systems of criminal justice' in the age of globalisation.

These developments cannot be ignored, especially because the United Kingdom's Sentencing Council has issued guidelines that will be examined in this thesis. That being said, the thesis carefully delineates the scope of the comparative analysis it proposes to conduct. It does not consider the institutions per se, or the processes and other arrangements that have been concluded regarding the allocation of sentencing power. Rather, its focus will be on the principles that underlie the sentencing systems in Nigeria, South Africa and England and Wales, and what lessons may be shared or borrowed. To this end, the thesis adopts the socio-historical and functional approaches to comparative study, in order to portray different eras and continuities (if any) in social attitudes regarding punishment and how these are impacting sentencing law and policy in each of the three countries.

⁹⁶ Human Rights Council Resolution A/HRC/RES8/8, adopted on 18 June 2008.

⁹⁷ See article 4(3) of the Consolidated Version of the Treaty on European Union of 2008.

⁹⁸ Estella Baker 'Sentencing guidelines and European Union law' in Andrew Ashworth & Julian V Roberts *Sentencing Guidelines: Exploring the English Model* (2013) 257-282 at 276. Baker remarks that the potentials for greater influence on national penal law was heightened following the introduction of legal and institutional reforms after the Treaty of Lisbon came into force in December 2009.

⁹⁹ Except for references to Britain in a historical context, other mention of Britain in this thesis is a reference to England and Wales.

¹⁰⁰ See Baker op cit note 97 at 271-282; see also Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

¹⁰¹ David Nelken 'Comparing criminal justice' in Mike Maguire, Rod Morgan & Robert Reiner (eds) *The Oxford Handbook of Criminology* 5 ed (2015) 138 at 141, but see generally 139-143.

A socio-historical analysis explains the genesis of the law, how it arrived at its present state and why it has worked or failed to work in particular settings. As a method, it is helpful when transplantation is a possibility. In this research, the approach will explore commonalities or explain dissimilarities between different sentencing systems as they evolved, examine how problems were resolved and enhance understanding regarding why certain sentencing principles may or may not work across different penal systems.¹⁰² The functional method will analyse sentencing law in the context of the problems they were intended to resolve and what they in fact achieved. Focusing on epistemologies surrounding punishment (that is, the culture-specific contexts of understandings regarding sentencing), this thesis proceeds on the premise, as functional comparative studies are wont to do, that sentencing disparities are experienced in different penal systems for similar reasons and that sentencing legislation and guidelines are adopted for similar reasons – to rationalise sentencing discretion and thus eliminate or reduce sentencing disparities. Therefore, the principles that underpin the processes and institutions that rationalise discretion, and the processes and institutions themselves, will to some degree, share similarities. In essence therefore, the functional method will direct attention to the attendant impacts of (sometimes coterminous) developments in the field of sentencing and their effects in the three countries (or legal systems) selected for this research.¹⁰³ Of course, the functional approach will not be focused on epistemologies only. It will also appraise sentencing policy and legislation in the selected legal systems to determine which model can better fulfil the aims of rationalising sentencing discretion in Nigeria, while also responding to the penal system's need for frugality.

The thesis' choice of comparative methodology is informed by the common thread that connects the three legal systems in the study. Nigeria, South Africa and England all share an English common law tradition, especially in the sphere of criminal law, though South Africa also

¹⁰² Historical analysis of the law in comparative perspective does not necessarily entail a thorough historical study. Rather, the historical component features as one of other 'important ingredients' of understanding law from a comparative perspective. See Mathias Reimann & Alain Levassuer 'Comparative law and legal history in the United States' (1998) Vol. 46 *Am. J. Comp. L. Supp.* 1-16 at 1-4; Reinhard Zimmermann 'Legal history and comparative law' Being a speech at the University of Lleida on 25 October 2007 available at http://www.udl.es/export/sites/UdL/organs/secretaria/honoris/zimmermann_discurs.pdf, accessed 31 March 2014; Okeke (2012) op cit note 87 at 12-13.

¹⁰³ See Ralf Michaels 'The functional method of comparative law' in Mathias Reimann & Reinhard Zimmermann *The Oxford handbook of comparative law* (2006) 339-338.

has the added impact of Roman-Dutch law on its legal system. Nevertheless, similarities can be found in their common law histories and in the purposes to which criminal law and sentencing have been directed. While their respective sentencing systems have progressed along significantly different tangents, the fundamentals may, in principle, not be too different. Rather, it will be argued that tangents of progression reflect different states of development and contexts. This then provides a basis for studying experiences across each legal system, for comparing lessons and engaging in some degree of selective borrowing.

Ordinarily, a study of this nature may require a collation and analysis of primary data regarding the root causes of the sentencing disproportionalities and inconsistencies that have been identified in this chapter, using case-by-case analogies to illustrate the dimensions of the problems and how they depict the need for reforms. Such an enquiry may be particularly desirable where serious problems arise from the use of judicial discretion. However, there are official state reports and other literature¹⁰⁴ that acknowledge and illustrate these problems. These make researching the root causes unnecessary. The problems have also been acknowledged in judicial pronouncements especially in Nigeria and South Africa.¹⁰⁵ The thesis accepts these acknowledgments as accurate depictions of the problem.

Accepting these acknowledgements is consistent with the criminological approach in punishment discourses. Generally, such discourses follow at least one of three traditions – the philosophical, sociological, or criminological approach. The philosophical approach is also called the traditional or classical approach. It engages with the ethical basis of punishment and the State's power to punish. Simply stated, it seeks to resolve moral objections to the infliction of penal suffering and to interests or purposes such treatment is designed to serve.¹⁰⁶ The sociological approach explores the social foundations of punishment for a comprehensive

¹⁰⁴ See for example, Nigerian Law Reform Commission op cit note 3; See also South African Law Commission *Sentencing: A Sentencing Framework* (2000); see further South African Law Commission *Sentencing (A New Sentencing Framework): Report* (2000).

¹⁰⁵ See for example, *Onyilokwu v Commissioner of Police* 1981 (2) NCR 49; *S v Vilakazi* 2009 (1) SACR 552 (SCA).

¹⁰⁶ David Garland 'Sociological perspectives on punishment (1991) Vol. 14 *Crime and Justice* 115-165 at 116; Kevin Murtagh 'Punishment' *Internet Encyclopedia of Philosophy* available at <http://www.iep.utm.edu/punishment/>, accessed 20 April 2014. According to Duff, 'the central question asked by philosophers of punishment is: What can justify punishment?' See Antony Duff 'Legal Punishment' (2013) in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy*, available at <http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/>, accessed 20 April 2014.

account of the social functions it fulfils, its unintended social consequences and the impact that punishment has on the offender and society. It seeks an explanation of the relationship between punishment, penal institutions and society, and views punishment as a ‘complex social institution’, defined, given meaning and assigned functions and form by a combination of socio-historical forces that shape the institution.¹⁰⁷ A distinctive method of the sociological approach is that it ‘views the institutions [of punishment] from outside, and seeks to understand their role as one distinctive set of social process situated within a wider social network’.¹⁰⁸

The criminological approach studies penal institutions from within, in order to comprehend their penological functions.¹⁰⁹ It assumes that philosophical and sociological accounts of punishment and the State’s reasons for using punishment as a crime control measure are generally true,¹¹⁰ and preoccupies itself with finding solutions that will help the State realise its goals or ideas regarding punishment. For example, the criminological approach seeks to understand or discover how penal measures can be made to reduce penal severity and maximise security, and how reforms can be directed to achieve the objectives of punishment. It is particularly more concerned with the values of fairness and consistency that penal justice ought to embrace, and with testing the efficacy of the strategies for implementing its goals, than with the outcomes of its processes.¹¹¹

Given this thesis’ focus on reforming Nigeria’s sentencing system, it adopts a method of enquiry that is consistent with the criminological approach. This thesis proceeds from the assumption that the problems exist for the same reasons expressed by Atsenuwa,¹¹² for doubting the ‘need for fresh studies to document the nature or scope or dimensions of problems facing criminal justice administration in Nigeria ... as available data does not indicate that significant changes have taken place vis-à-vis the situation of ... sentencing.’ She resolved any doubts over

¹⁰⁷ Garland (1991) op cit note 105 at 119; David Garland & Peter Young ‘Towards a social analysis of penality’ in David Garland & Peter Young (eds) *The Power to Punish: Contemporary Penalty and Social Analysis* (1983) 4-5; But see also David Garland *Punishment and modern society* (1990) 10.

¹⁰⁸ Garland (1991) op cit note 105 at 119-120.

¹⁰⁹ Ibid; see also Garland (1990) op cit note 106.

¹¹⁰ For instance, compromise or hybrid theories that justify punishment agree that punishment may serve legitimate retributive and utilitarian ends in any given penal system. See Barbara Hudson *Understanding Punishment: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (1996) 57-58; Barbara Hudson *Justice in the Risk Society: Challenging and Re-Affirming ‘Justice’ in Late Modernity* (2003) 23-24, 28.

¹¹¹ Hudson (1996) op cit note 109 at 10-11.

¹¹² Atsenuwa op cit note 1 at 107.

the veracity of this observation by further stating, after conducting a review of criminal justice sector reforms between 1999 and 2007, that:

there are areas directly and gravely impinging on the ability of the justice system to deliver justice where judicial activism is required to clarify the law and thus impact the criminal justice system ... [One] area is the area of sentencing. It would have been expected that the judiciary by now would have started to self-regulate sentencing practice through the adoption of Practice Directions and providing case law precedents. Interestingly, all sentencing related reforms have emerged from the executive arm in form of legislative Bills. However, none of the Bills ... was enacted before change of government in May 2007 ... [I]t is yet possible to argue that failure of the legislature to provide support to the many initiatives introduced, rests on the failure of the other key stakeholders namely: the executive, the judiciary and civil society to engage it as partners...¹¹³

How the courts approached sentencing in the above mentioned cases of *Amoshima* and *Epko* suggest that Atsenuwa's observation remains valid today. However, though the philosophical and sociological approaches are not the preferred approach in this thesis, elements of both approaches will be seen in discussions of the ethical basis of punishment, as well as in the socio-historical context of punishment in the three countries examined in this study.

1.6 Delimiting the Scope and Foregrounding the Limitations of the Research

It is necessary to clarify the way in which the word postcolonial is used in this thesis. The notion of the 'postcolonial' stands central to the rapidly evolving field of postcolonial studies. As an area of inquiry it reflects considerable diversity and complexity. Contestation over concepts, and the interpretative frameworks best suited to analysis of, for example, relationships, identity formation and power in the postcolony characterise the debates. The notion of the postcolony is frequently invoked as an analytical lens to explore how formerly colonised people re-construct their identities and navigate the impact of structural and psychological effects of colonial domination. In recent years South African debates too have come to grapple with the postcolony both as theoretical lens and political practice. Spirited conversations over the legacies of colonialism and apartheid have become part and parcel of the kinds of political activism amongst students and staff on many South African campuses.

¹¹³ Ibid at 106-107.

Having recognised briefly the conceptual/analytical and deeply political facets of postcolonial studies above, it needs to be understood that in this thesis the notion of the postcolony is used in a purely descriptive manner. Although the thesis explores the historical development of penal policy in two former colonies, it is simply for didactic and comparative purposes. No critical post-colonial lens has had to be deployed for this purpose. ‘Post-colonial’ has been employed in a literal and purely descriptive manner to allude to Nigeria as a former colony that has retained grossly dysfunctional colonial penal structures since it became politically independent.

This thesis is about rationalising the use of discretion in judicial sentencing. Its focus is on the principles that have evolved to help judges impose penalties that meet the need for proportionality between the crime and punishment. It explores the origins of these principles and imagines a role for them in achieving proportionality and consistency in the sentences that Nigerian judges impose. Its overarching goal is to find a structured framework that judges could use when awarding punishments, which infuses judicial ratiocinations of punishment with principles that enhance penal moderation and ensure the consistency of punishment with values that are (or ought to be) protected by the 1999 Constitution of Nigeria. Although the thesis examines the principles in the context of how thinking about punishment evolved, the objective is to provide a basis for understanding how judges interact with them.

Sentencing is a broad component of studies about punishment. This thesis does not aim to cover every question that could be considered under sentencing. For instance, even though the thesis writes about the need for judges to utilise penal alternatives to prison (and briefly discusses a few alternatives in chapter six), its thrust is not to discuss what those alternatives entail. Also, it does not examine how sentencing interacts with or responds to specific, special or vulnerable categories of offenders, such as children. A focus on children is not indispensable to understanding the principles that should rationalise sentencing discretion generally. Besides, a discussion of sentencing for juvenile offenders would require a consideration of issues that will make enough content for another doctoral thesis. It is hoped that a sentencing scheme that is founded on the principles that this thesis proposes will provide a useful foundation for further developing a sentencing scheme that is adapted to the needs of juvenile offenders or other special interest groups. At the moment, that foundation does not exist in Nigeria.

A considerable body of Nigerian and international literature already debate the abolition of the death penalty in Nigeria and this paper will not retrace this ground. The thesis will thus maintain a focus on finding a principled approach that brings international human rights standards into what ought to be the model scheme for moderating punishment in Nigeria. Accordingly, any discussion of the death penalty in Nigeria in this paper will be in the context of making a case for penal moderation.

Further, the thesis does not examine questions about how parole influences the portion of a prison sentence that an offender serves. The reasons are as follows: first, parole – or the absence of it – has not been identified or prioritised as a problem in the available few texts that have been written on punishment in Nigeria.¹¹⁴ Secondly, parole is hardly the primary factor when a judge evaluates penal proportionality. Release on parole is a post sentence administrative decision that is dependent on the discretion of the correctional officer. Besides, a parolee is still considered to be serving his sentence under supervised release. Should the conditions of parole be breached, parole will be revoked and the offender must serve the rest of the sentence in prison.¹¹⁵ Lastly, parole is limited to prison sentences. It does not apply to other penal alternatives to which the same principles of proportionality also apply.

1.7 Outline of the Thesis

The outline flows from the methodology adopted. This chapter illustrated how Nigeria's failure to move away from the colonial mould in which its criminal justice system was cast has foisted incoherence on the country's post-colonial sentencing policies, resulting in disproportionate and punitive punishments. It portrayed the wide discretionary powers that judges exercised during sentencing to be an impediment to principled sentencing and called for changes that place proportionality and human dignity protections at the heart of sentencing. Chapter two focuses on finding a conceptual basis for criminal punishment in Nigeria and interrogates the reasons behind

¹¹⁴ One of these texts by Gena Barbieri 'Prisons' in Rita J Simon (ed) *A Comparative Perspective on Major Social Problems* (2001) 41-78 at 69-70, points to the absence of a parole system in Nigeria, but recognises that certain categories of prisoners may be granted pardon by the state, or that prisoners may earn time off for good behaviour, thereby becoming entitled to early release. However, bad behaviour could also result in loss of time, in which case the prisoner may have to serve out the prison sentence.

¹¹⁵ Michael Jacobsen *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration* (2005) Chapter 5.

Nigeria's sentencing dilemma. It offers clarifications about concepts associated with criminal punishment and discusses how theories of punishment respond to moral, rights-based or other challenges to the practice of punishment. The chapter seeks to fill a jurisprudential gap in debates about punishment in Nigeria, and to shift the approach to sentencing from a mechanically driven approach to a rational one. It accordingly explores the literature on mainstream theories and compromise theories, measuring them against prevailing attitudes about punishment in Nigeria. It explains the relative strengths and weaknesses of the theories and why no single theory adequately justifies the practice of punishment. It then attempts to reconstruct the conceptual basis for punishment in Nigeria.

Chapter three examines the socio-political contexts of discourses in punishment. It argues that time, political ideology and social contexts instigate shifts in cultures of punishment and that debates about punishment have been waged within shifting streams of ideological thought, which give meaning and content to penal policy. It shows how socio-political thoughts and developments have come to influence – and in many respects – temper modern or postmodern attitudes regarding punishment. It examines these influences in the three legal systems, starting with Britain in the medieval era, through the renaissance to the modern era. For South Africa, the journey begins in the colonial era, traverses different stages up until the post-apartheid era. The history of modern criminal law in Nigeria also starts with the colonial era, though nothing has changed much in the criminal law since that era. Nevertheless, the chapter reviews the progress of efforts to reform sentencing in Nigeria and highlights what more needs to be done.

Chapter four examines the normative framework of sentencing in Nigeria and South Africa in their most developed form. It conducts in-depth analysis of the legal framework for sentencing in both systems, paying particular attention to how courts have given meaning to the framework. Two other factors inform the choice of Nigeria and South Africa. First, both countries are democracies with written Constitutions. This offers a basis for a comparative constitutional analysis of punishments in both legal systems. A constitutional analysis for punishments could have been done for Britain as well, but this would not be from a single constitutional instrument as can be found in the other two countries. Besides, Britain lacks the context that Nigeria and South Africa offers, of studying sentencing policy and legislation in the

peculiar context of a contemporary developing economy. Nigeria and South Africa offer a setting to discuss punishment both in a constitutional and developing country context. Accordingly, the chapter examines the constitutional basis of punishment and various pieces of sentencing legislation. It studies how courts have interpreted these sources of law and applied them in combination with the goals and principles that underpin sentencing. The chapter focuses on judicial decisions to portray what Nigerian courts can learn from the process of judicial reasoning that South African courts have employed.

Using sentencing for rape crimes as an illustration, chapter five examines the inadequacies of the South African sentencing system in particular. It discusses whether sentencing legislation and the principles that have been judicially developed have indeed enhanced sentencing proportionality and consistency. South Africa and Nigeria form the basis of the discussion, for the same reasons offered above.¹¹⁶ At the heart of this analysis in particular, is South Africa's Criminal Law Amendment Act 105 of 1997. The chapter looks at the inadequacies of s 51 of the law in rationalising discretion and reducing disparities. Its focus on rape is predicated on the convergence of societal apprehensions over the crime's prevalence and threat, which has provoked a corresponding desire within the South African society to act with urgency and decisiveness against the crime and to punish offenders with a measure of severity that reflects society's moral trepidation at the crime. A few corresponding features are also highlighted in rape crimes and punishment in Nigeria. For both countries, rape provides an example of the socio-cultural context of crime and punishment that chapter three discussed. In exploring rape sentencing, however, the chapter brings to the fore sentencing aspects that require further development. It concludes that inadequacies in sentencing legislation portray the need for sentencing guidelines.

Chapter six explores model sentencing guidelines. It compares two models, namely the Minnesota Sentencing Guideline and English Sentencing Guidelines, focusing on the policies and principles that underline them and on how the guidelines have rationalised sentencing discretion and enhanced consistency. It identifies those elements, particularly from the English

¹¹⁶ Besides, exploring the challenges in the English context may be unnecessary because the three countries in the study have experienced similar challenges. Examining those challenges in the English system therefore does not offer any particularly different perspective, or additional value.

model, which would enhance the type and quality of guidelines that current attempts at sentencing reforms in Nigeria should seek to develop.

Chapter seven summarises findings and concludes amongst others, that constitutional and legislative reforms and guidelines are necessary to rationalise sentencing discretion. It recommends principles for a sentencing guidelines for Nigeria.

Chapter 2 Imagining a Principled Basis for Sentencing in Nigeria

2.1 Introduction

Chapter one identified the absence of a constitutional principle that regulates penal severity and preserves proportionality in punishments as a reason for gross disproportionalities in punishments in Nigeria. It also asserted that there has been little judicial or scholarly engagement with rationalising punishment, which creates a knowledge gap on the subject in Nigeria. This chapter examines these assertions further by considering how proportionality enhances sentencing fairness and strengthens protections against cruel, inhuman or degrading punishment. The chapter commences with a few clarifications regarding concepts and principles that are frequently associated with the distribution of punishment, but which are often absent from sentencing jurisprudence in Nigeria. It then explores the theoretical foundations of punishment in Nigeria and proceeds to discuss how these need to be developed to embrace new principles that have been utilised to regulate sentencing discretion and penal severity in jurisdictions like Britain. These principles are important because they are taken into consideration when developing sentencing guidelines.

In line with explanations offered in chapter one regarding criminological discourses about punishment, this chapter accepts the veracity of official claims about the purposes of punishment in Nigeria and explores their meaning within Nigerian jurisprudence, and within broader philosophical discourses about the theories of punishment. It then attempts to imagine a principled rationale for distributing punishments in Nigeria. Again, following the criminological approach, the chapter is less concerned with illustrating the effects of sentencing processes in Nigeria. There are useful resources in this regard already, which are corroborated by a number of judicial decisions considered below, that highlight or confirm the inconsistencies and punitiveness associated with sentencing in Nigeria. This work can therefore assume the correctness of these resources.

However, there is a challenge that confronts this chapter's attempt to imagine a principled basis for punishment in Nigeria, which emerges from the focus of existing research on identifying and understanding the problems. The focus has hitherto diverted scholarly attention from attempting a principled resolution of the problems, or from systematically developing jurisprudence around the purposes to which punishments may be directed, which leaves the present effort with scant Nigerian resources to draw from. Thus, an attempt as the present one, to kindle interest in such engagement in Nigeria must draw inspiration from the developments that have happened in other penal climes during the prolonged scholarly hiatus on the subject in Nigeria. This entails reviewing changes in penal thinking that has happened outside Nigeria in the past two or three decades. But first, the section below clarifies the sense in which 'punishment' and other concepts associated with punishment are used in this thesis.

2.2 The Meaning of 'Punishment'

'Punishment' has a variety of meanings. It may refer to fines for civil infractions, to disciplinary measures that a parent or teacher imposes on a ward, or to penalties for infringements of the rules of a game. When the word is used in these contexts, a civil, rather than penal connotation, is intended. However, when punishment refers to penalties that are imposed as a response to criminal behaviour, a penal meaning is conveyed.¹ Attempts to define criminal punishment often

¹ It has been argued that these variations in meaning show that 'punishment' has a vagueness or elasticity of use and meaning that renders any definition inconclusive and incapable of providing a normative basis for theoretical justifications of punishment. See Anthony Flew 'The justification of punishment' (1954) Vol. 29 No. 111 *Philosophy* 291-307 at 291-4. Dolinko, on the other hand, acknowledged different approaches to defining punishment. One approach extends the definition beyond legal punishment – which is only a variety of punishment – to include more general uses of the word, such as when it is used in connection with parental discipline. However, Dolinko alludes to a broad recognition among even those who adopt a more expansive definition that 'legal ... punishment is a distinctive practice that calls for a justification of its own'. See David Dolinko 'Punishment' in John Deigh & David Dolinko (eds) *The Oxford Handbook of Philosophy of Criminal Law* (2011) 403-405. This broad recognition is important. It has been argued that justifying a practice presupposes clarity of meaning regarding the subject matter of the discussion. See Stephen Sverdlick 'Punishment' *Law and Philosophy* Vol. 7 No. 2 (1988) 179–201 at 179-180. This does not necessarily require incorporating every possible nuances of the word, because that is hardly the goal of theoretical disciplines in penology. Such a catholic approach is antithetical to a definition. Thus, Berman agreed with Duff, that efforts at definition are doomed to fail if the goal is to arrive at a definition that captures all the elements that feature in punishment, and to offer this as the standard for 'any normative discussion' on the justification of punishment. Traditionally, definitions of punishment offer a list of its constitutive elements. Thus, Duff defined punishment as 'something intended to be burdensome or painful, imposed on a (supposed)

distinguish between civil and penal uses of the word.² Typically, they list up to five definitive elements that associate censure with criminal punishment.³ For the purpose of this dissertation, they will be summarised into three elements. First, criminal punishment involves the intentional infliction of suffering or deprivation, which ordinarily ought not to be done. Its infliction therefore, must be predicated on a justified premise.⁴ This premise is provided by the second element, to wit, punishment may only be inflicted for breaking a rule that proscribes conduct that society disapproves as inimical to its interests. Underpinning the second element is the legitimate expectation that a person may only be punished because he or she broke the law, not otherwise.⁵ The third element requires that punishment be only inflicted by someone who has the authority (usually assumed to be the State) to do so and in accordance with the due process of law.

From the foregoing, punishment may be defined as a treatment or deprivation that communicates censure, which is imposed under the authority of the state and in accordance with due process, on someone who commits an act that is prohibited by law. A very important and distinctive feature of this definition is the fact that punishment censures behaviour. The discussion below explores the relationship between punishment and censure.

offender for a supposed offense by someone with (supposedly) the authority to do so'. See Mitchell N Berman 'Punishment and Justification' (2008) Vol. 118 No. 2 *Ethics* 258-260.

² Barbara Hudson *Understanding Punishment: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (1996) at 1-2. According to Hudson, 'the punishment that is the subject matter of penology ... does not encompass everything that is painful or demanding ... [or] all kinds of control or discipline of one person by another'.

³ See Thomas Hobbes *Leviathan* (1998) JCA Gaskin (ed) 205. Flew op cit note 1; SI Benn 'An approach to the problem of punishment' (1958) Vol. 33, No 127 *Philosophy* 325-341. Hart, relying on Flew and Benn, listed five definitive elements, namely punishment must: (i) involve pain or some other unpleasant experience; (ii) be inflicted for rule breaking; (iii) on an actual or supposed offender, and for his offence; (iv) intentionally by someone; (v) who has duly constituted authority under by legal system whose rules were violated by the offensive act, to impose the punishment. HLA Hart 'The Presidential Address; prolegomenon to the principles of punishment' (1959-1960) Vol. 60 *Proceedings of the Aristotelian Society, New Series* 1-26 at 3-4; see also Dolinko (2011) op cit note 1 at 404.

⁴ Kevin Magill 'The idea of a justification for punishment' (1998) Vol. 1 No. 1 *CRISPP* 86; see also Jeremy Bentham *An Introduction to the Principles of Morals and Legislation* (1970) 158.

⁵ Penal law is suspect without such expectation. See Russell L Christopher 'Deterring retributivism: the "injustice" of just punishment' (2002) Vol. 96 No. 3 *Northwestern University Law Review* 843 at 852.

2.2.1 Punishment as Censure

In his theory of the expressive function of punishment, Feinberg⁶ wrote that punishment had a symbolic function; through punishment, a community communicates its disapproval of the offender's conduct. Although this function is often associated with retributivism, the element of censure (disapproval) in punishment may also have a deterrent effect. Von Hirsch and Ashworth's⁷ explanations in this regard are useful; they articulated the censure element as conveying a normative message of moral disapproval regarding offensive conduct. In their views, it is this element that distinguishes criminal punishment from other forms of sanctions that utilise pain without communicating disapproval.

Implicit in Von Hirsch and Ashworth's account of censure is the claim that punishment treats the offender as a moral agent who is both capable of moral reflection and can understand the rightness or wrongness of his or her conduct. In this regard, the strength of 'censure' lies in the moral appeal it addresses to the offender as someone capable of moral judgment, or the normative reason it provides against acting in ways that will attract public disapproval. In punishment, the offender is confronted with the wrongness of his or her conduct and offered the opportunity to acknowledge the wrongdoing or make 'effort[s] at better self-restraint'.⁸

However, censure does more than provide normative reasons for desistance. A second constitutive element in censure is hard treatment, which provides a further incentive for rule compliance, especially to those who may not be sufficiently motivated by the moral appeal of censure. For such individuals, censure works through hard treatment. It is here that the preventative function in censure features; censure warns that certain conducts are reprehensible and punishable, thereby providing a prudential reason for exercising self-restraint that is 'tied to the normative reason conveyed by penal censure'.⁹ However, this preventative function cannot stand alone; it may only be expressed within a structure that places censure at the heart of punishment, so much so that the manner in which it is expressed also 'embodies a prudential

⁶ Joel Feinberg 'The expressive function of punishment' (1965) Vol. 49 No 3 *The Monist* 397-423 at 401-404.

⁷ Andrew Von Hirsch & Andrew Ashworth *Proportionate Sentencing: Exploring the Principles* (2005) 17-21.

⁸ Ibid at 18, 24-26.

⁹ Ibid at 22-3, see generally pp 18 & 21-2; Andrew Von Hirsch 'Proportionate sentences: A desert perspective' in Andrew von Hirsch & Andrew Ashworth (eds) *Principled Sentencing: Readings in Theory and Policy* (1988) 168-179 at 170-171.

disincentive'.¹⁰ This view of the relationship between censure and hard treatment plays an important role in Von Hirsch and Ashworth's views about distributive principles in a sentencing scheme, discussed later in the chapter.

2.2.2 Punishment as a Curtailment of Rights

One may proceed from the assertion that punishment asserts the moral agency of the offender to discuss the claim that punishment curtails human rights that are protected in national Constitutions. The rights to liberty, life and human dignity, or the right not to be intentionally subjected to suffering or harm, are rights particularly threatened by punishment. Their curtailment through punishment would ordinarily be morally objectionable. In penal thinking however, when the curtailment of rights can be justified, it is not a violation. A person may only assert his rights against the State when he or she lives within reasonable constraints established by the law. When an offender criminally encroaches on the rights of another however, he or she incurs punishment. Punishment, in this sense, entails the deprivation or removal of something typically valuable, such as liberty or property, or life (in countries that permit death sentences). To not inflict punishment that the offender deserves deprecates the freedoms that others enjoy and undermines the promise of the criminal law, or the system of punishments that underline that promise.¹¹

The above depiction of the relationship between rights and punishment adjusts the focus of efforts to justify punishment. It shifts the debate, however slightly, from attempting to provide an excuse for the intentional infliction of penal suffering *per se*, to responding to moral objections to the intentionality in bringing about suffering. The human rights principle assumes

¹⁰ Von Hirsch & Ashworth (2005) op cit note 7 at 23-4, see generally pp 22-25. The authors' views are consistent with Feinberg's observation that hard treatment conveys censure because it is conventionally believed to do so. See Feinberg op cit note 6; Andrew von Hirsch *Censure and Sanctions* (1993) 12-14.

¹¹ Ronald Dworkin *Taking Rights Seriously* (1978) 10, 194-5; Michael Cavadino & James Dignan Michael Cavadino & James Dignan *The Penal System: An Introduction* 3 ed (2002) 55-6; see also James Griffin *On Human Rights* (2008) 65. An explanation of the relationship between punishment and rights curtailment has been suggested in the doctrine that the offender forfeits his rights. Griffin describes the doctrine as a factitious proposition that has not been 'deeply worked out'. The problem with the doctrine stems from having to decide what precisely the offender forfeits. Therefore, Griffin preferred the notion of deserts, which determines the nature and amount of punishment that the offender receives according to what his crime deserves. Thus, what the offender 'forfeit[s] is not a right *simpliciter*; the forfeit' is whatever punishment turns out to be just'.

that criminal punishment provides countervailing reasons that demonstrate why its curtailment of rights does not amount to a violation of those rights.¹² Within national contexts however, the principle yields different standards that reflect the interpretations that domestic courts place on constitutionally guaranteed rights and the limitations thereto. Thus, in the case of *S v Williams and Another*,¹³ the Constitutional Court of South Africa held that corporal punishments violated constitutional prohibitions against cruel, inhuman or degrading treatment or punishment guaranteed by s 11(2) of the 1993 Interim Constitution of South Africa.¹⁴ Subsequently in *S v Makwanyane*,¹⁵ the same court held that the death penalty was an unconstitutional violation of the rights to life and human dignity. Conversely, however, in *Gregg v Georgia*,¹⁶ the United States Supreme Court held that the death penalty *ipso facto* did not violate the Eighth Amendment to the United States Constitution, which prohibits excessive fines and ‘cruel and unusual punishments’; it is unconstitutional only when it is disproportionately severe in comparison to the gravity of the alleged offence for which it is sought to be imposed. These decisions illustrate that punishments may only amount to violations when objections to how they curtail rights cannot be overcome within the (constitutional) jurisprudence of individual penal systems. In Nigeria, the Supreme Court affirms the constitutionality of the death penalty and enforces it.¹⁷

2.2.3 The Principle of Proportionality

A significant aspect of this chapter focuses on proportionality; its meaning and applications will become clearer as the discussion progresses. Proportionality is a principle of distribution that requires punishment to be commensurate to the offence. The principle is hinged on the conventional belief that a sanction is more equitable when it compares in gravity with the

¹² Berman (2008) op cit note 1 at 267-8, 272-4 & 284-5.

¹³ 1995 (3) SA 632 (CC).

¹⁴ Act 200 of 1993. The prohibition is now contained in s 12(1)(e) of the Constitution of the Republic of South Africa 1996.

¹⁵ 1995 (2) SACR 1.

¹⁶ 428 U.S. 153 (1976).

¹⁷ See for example, *Onuoha Kalu v The State* [1998] 13 NWLR 531; *Okoro v The State* [1998] 14 NWLR 584; *Joseph Amoshima v The State* (2011) LPELR-SC.283/2009; *Umoh Ekpo v The State* LER [2014] CA/L/96/11.

seriousness of the offence and that equity is breached when a sanction is not proportionate to the crime.¹⁸

As a principle for distributing punishment, proportionality responds to critical questions about measuring penal severity. It is a measure of the degree of disapproval with which society regards an offender's conduct; the more blameworthy the offence is, the higher the punishment becomes in severity. A severe punishment communicates that the offence is very reprehensible. Conversely, a lenient punishment communicates a lesser degree of blameworthiness. A proportionality-based penal scale therefore organizes offences in their order of blameworthiness.¹⁹ The principle is very important, because a disproportionately ordered scale may convey wrong messages regarding the relative severity of offences.²⁰ Sometimes, judicial decisions equate grossly disproportionate sentences with injustice,²¹ or regard proportionality as a principle that lies at the heart of determining whether punishment violates the constitutional prohibition on cruel, inhuman or degrading punishments.²²

2.2.4 The Principle of Parsimony

Succinctly, parsimony is the requirement that punishment should select the least restrictive or punitive measure to achieve the desired end.²³ Tonry²⁴ traces the principle to Bentham, who argued that 'avoidable human suffering is undesirable, and urged the adoption of a "principle of parsimony" by which punishment would be justified to the extent that suffering by others was reduced'.²⁵ In the nineteenth century, parsimony provided a reason for rejecting penal

¹⁸ Von Hirsch (1993) op cit note 10 at 6.

¹⁹ Ibid at 15-16.

²⁰ Cavadino & Dignan (2002) op cit note 11 at 56.

²¹ For example, in *S v Malgas* 2001 (1) SACR 469 (SCA) at 472 paras H-I, 480 para H – 481 para D, and 482 para E, South Africa's Supreme Court of Appeal expressed concern about sentencing legislation that obligate courts to impose sentences which, in the circumstances of the case, would be manifestly unjust.

²² See *S v Dodo* 2001 (3) SA 382 (CC) at 403 para H - 404 para B; Dirk van Zyl Smit 'Sentencing and punishment' in Stuart Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* 2 ed Revision Service 4 (2012) Juta, Cape Town 49-14 to 49-16.

²³ Andrew Von Hirsch 'The future of proportionate sentence' in Thomas G Blomberg & Stanley Cohen (eds) *Punishment and Social Control* (2003) 271-290 at 283; Norval Morris 'The future of imprisonment: Toward a punitive philosophy' (1974) Vol. 72. No. 6 *Michigan Law Review* 1161-1180 at 1162.

²⁴ Michael Tonry 'Intermediate sanctions in sentencing guidelines' (1998) Vol. 23 *Crime and Justice* 199-253 at 202-203.

²⁵ Ibid.

punitiveness. Subsequently in the mid to late twentieth century, the principle was again used to counter retributivist objections to utilitarian approaches to punishment. Within this period, a strong presumption in favour of sanctions that were less restrictive and intrusive than imprisonment became pervasive in scholarship. The interest was hinged upon humanitarian and utilitarian considerations that penal suffering beyond what has deemed necessary by society was cruel.²⁶

As a principle therefore, parsimony calls for measures that are less drastic than incarceration.²⁷ However, the need for such measures is neither purely humanitarian, nor limited to the best measures that would achieve crime reduction. Parsimony also requires frugality in public expenditure on penal corrections. For humanitarian and economic reasons therefore, the American Law Institute (ALI), amongst others, has supported the adoption of the ‘least restrictive penal policies’.²⁸ Led by the principle, the ALI adopted a Model Penal Code that required courts to impose other punishments unless imprisonment was necessary for purposes of public protection. Section 7 of the code provided the conditions for imposing prison sentences. These included where the offender presented a high risk of re-offending if he or she were placed on a suspended sentence or probation, or where the offender’s rehabilitation could only be effectively provided through confinement in a correctional institution. Inspired by the Model Penal Code, more than half of America’s states substantially revised their respective criminal codes.²⁹

From the foregoing, it can be seen that proponents of parsimony view incarceration as a severe penalty that should be used sparingly in the most serious cases where the offender posed a serious risk of danger to the public. Morris³⁰ offered one other condition: imprisonment should be used ‘only when any alternative punishment would deprecate the seriousness of the crime, or is necessary for general deterrence, or when all else practicable has been applied...’

²⁶ Morris (1974) op cit note 23 at 1163.

²⁷ Ibid.

²⁸ Tonry (1998) op cit note 24.

²⁹ Morris (1974) op cit note 23 at 1163.

³⁰ Ibid at 1176.

Having made these clarifications about punishment, the stage is set for a discussion on the theoretical basis of punishment, starting first with how Nigeria rationalises punishment.

2.3 Rationalisations of Punishment in Nigeria

Although the Nigerian Law Reform Commission³¹ has claimed that sentencing in Nigeria is conceptualized around deterrence, retribution, reformation and victim reparation, opinions are divergent regarding the objects of Nigeria's sentencing policy, or whether in fact a policy exists. At a conference of Nigerian judges in 1988, Douglas J³² argued that no sentencing policy can be distilled from Nigeria's criminal statutes and that the wide discretionary powers that courts exercise frustrate efforts to unravel a sentencing policy from judicial decisions. At the same conference, however, Okunribido J³³ expressed the contrary view that criminal statutes express the lawmaker's policy on sentencing 'based on his understanding, or perhaps, assessment of the object and purpose of punishment'. Differences of this nature forced the Presidential Commission on the Reform of the Administration of Justice (PCRAJ)³⁴ to acknowledge in 2006 that the 'true purpose of sentencing in the Nigerian criminal justice systems is very contentious' even though it is theoretically agreed that the system's goals are conceptualised around 'retribution, reformation... and victim reparation'. Complicating this picture is Nigeria's penal pluralism, which belies penal uniformity across the country.³⁵ None of Nigeria's penal regimes provides a statement of the sentencing objectives that courts should uphold.

³¹ Nigerian Law Reform Commission 'Towards a more consistent and uniform sentencing programme in Nigerian courts' (August 1983) *N.L.R.C. Project No. 5*, 14.

³² DO Douglass 'Sentencing Policy' in *All Nigeria Judges' Conference Papers* (1988) 410-433 at 427.

³³ SO Okunribido 'Commentary' in *All Nigeria Judges' Conference Papers* (1988) 450-475 at 466-467. According to the jurist, 'there is a sentencing policy, embodied in the law, which [though] deficient in detail, would only need to be more comprehensive and more detailed...'.

³⁴ Presidential Commission on Reform of the Administration of Justice in Nigeria *Proposals for Reform of the Administration of Justice in Nigeria* (2006) 54-55. Even if it were possible to distil a policy from legislation, different researches note the difficulty of discerning the reasons for the decisions that sentencers make. These reports portray wide sentencing disparities that belie the existence of a sentencing policy. See AA Adeyemi 'Scientific approach to sentencing' in TO Elias *The Nigerian Magistrate and the Offender* (1972) 49. See JA Adefarasin 'Sentencing', in AA Adeyemi (ed) *Law Development and Administration in Nigeria* (1990) 159.

³⁵ Between 1982 and 1983, the Nigerian Law Reform Commission conducted what is probably the first nationwide study of sentencing in Nigeria. The study reported sentencing inconsistencies, partly because of complex relationships between diverse systems of criminal justice at different levels of government in Nigeria, which imposed substantive and procedural differences in the criminal laws enforced and resulted in 'differential treatment' for offenders. Differences were also glaring within individual legal systems. Judges exercised 'large elements of

Another striking observation about penal discourses in Nigeria is that they rehash well-worn accounts of punishment, mostly of English origin.³⁶ To be fair, given the influence of British colonisation on modern criminal law in Nigeria, some reliance on English principles and concepts may be expected. However, problems will arise when such reliance is not in step with modern penal developments, or with the present needs of criminal justice administration in Nigeria. These needs are unique to the Nigerian context and require the development of a responsive penal jurisprudence. Unfortunately, and as asserted in chapter one, available texts on punishment in Nigeria are dated and unable to address contemporary penal needs. They also offer no different accounts of punishment than the philosophical traditions have.³⁷ These accounts were discarded in the new thinking that have dominated penalty in the West since the 1980s especially. The tendency to rehash traditional accounts has encouraged Nigerian sentencers to apply limited penal formulations in infinitely varied factual circumstances.³⁸ It is portentous that these formulations originated in punitive attitudes that prevailed in the Britain of yesteryears. The most recent debates in Nigeria do not draw significantly on new thinking about deserts and proportionality that began to influence sentencing reforms in the West in the 80s.³⁹

personal discretions' that were shaped by the sentencer's background, emotions, outlook, training and experience. See The Nigerian Law Reform Commission (1983) op cit note 31 at 9. See also Ruud Peters *Islamic Criminal Law in Nigeria* (2003) 1-5 & 13-15.

³⁶ Some of Nigeria's leading criminal law texts offer brief accounts of the theoretical basis of punishment. See CO Okonkwo *Okonkwo and Naish on Criminal Law in Nigeria* (1980) 28; EH Ofori-Amankwah *Criminal law in Northern States of Nigeria* (1986) 13-18. Others do not mention the theories, possibly because they assume the theoretical basis of punishment in Nigeria. See JA Yakubu & AT Oyewo *Criminal Law and Procedure in Nigeria* (2000); Akinola T Aguda *The Criminal Law and Procedure of Southern States of Nigeria* 3 ed (1982).

³⁷ Nigerian authors also rely on classical theorists like Bentham, Beccaria, Kant, and twentieth century philosophers like Flew, Mabbott and Durkheim, to explain or teach punishment. See Okonkwo (1980) op cit note 36; AB Dambazau *Law and Criminality in Nigeria: An Analytical Discourse* (1994) 107-127.

³⁸ Alan Milner *The Nigerian Penal System* (1972) 54.

³⁹ In Britain, although efforts to humanise punishment gathered steam with the introduction of rehabilitation in the nineteenth century, the resultant changes were not extended to the British Colony of Nigeria. Much later, in 1963, Nwabueze wrote about a growing school of thought in English justice about that time, which demanded that punishment ought to fit the offender, and that sentencing should have regard to the likely effects it would have on the offender. The new trend received some recognition in ss 391 and 435 of Nigeria's Criminal Procedure Act, and in the requirement amongst others, that insane offenders be committed to asylums rather than imprisoned. Section 391 obligates courts to take the offender's means into consideration when awarding a sentence of fine, while s 435 empowers the court to place an offender on probation or order nominal punishment when having regard to the character, age, antecedents, health of the offender, or the trivial nature of the offence, it forms the opinion that a sentence is inexpedient. See BO Nwabueze *The Machinery of Justice in Nigeria* (1963) 238. These shifts may have drawn on the rehabilitative ideal behind twentieth century reforms in Britain. As far as the Colony of Nigeria was concerned however, the provisions had paper value. Essentially, criminal law in the colony was driven by the

At this juncture, an illustration of how Nigerian courts have grappled with traditional accounts of punishment will help to elucidate the jurisprudence that has evolved. First, however, it must be observed that judicial cogitations about punishment in Nigeria (as elsewhere) often regard retribution, deterrence, incapacitation or rehabilitation as the aims, objectives, goals or purposes of punishment, rather than as theories.⁴⁰ This judicial approach is consistent with Sir Fitzjames Stephen's⁴¹ views. Stephen deplored the tendency of theories of punishment to fit 'philosophical explanations' and the practical realities of judicial sentencing into separate planes, resulting in the 'desiccation, preciousness and insignificance of each'.⁴² In Stephen's view, theory and practice ought to be coterminous; they are better explained when they work hand in hand, checking and refining each other.⁴³

The above observation is pertinent. Theoretical disciplines have an inherent susceptibility to exclusivity, to offer one theoretical account as the sole basis for punishment. No theory, as Stephen⁴⁴ argued, can on its own offer a comprehensive account of an institution as complex as punishment. After all, in all practicality, judges are not called upon to find exclusive premises for the sanctions they impose, but to judiciously weigh the different aims that compete in punishment. Exclusive reliance on sole principles could derail that process and impede a proper consideration of all the values that bear on a prudent choice of punishment. Inclusivity therefore, rather than exclusivity, is key.⁴⁵ Others, such as Flew,⁴⁶ Hart,⁴⁷ Rawls,⁴⁸ Walker⁴⁹ and lately,

expediency of maintaining socio-political and control, rather than reform. See Simon Coldham 'Criminal justice policies in Commonwealth Africa: Trends and prospects' (2000) Vol. 22 No. 2 *Journal of African Law* 218-238 at 219-223. See also section 3.4 below.

⁴⁰ Thus, in *Onyilokwu v Commissioner of Police* 1981 (2) NCR 49, the court referred to the values as purposes of sentencing. In *S v Makwanyane* supra note 15, the Constitutional Court of South Africa referred to them as the main goals of punishment.

⁴¹ Marc O DeGirolami 'Against theories of punishment: The thoughts of Sir James Fitzjames Stephens' (2012) Vol. 9 *Ohio State Journal of Criminal Law* 699 at 722-723.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid at 722-28.

⁴⁶ Flew (1954) op cit note 1 at 295-6. Flew argued that exclusivity promotes a preferred alternative, while devaluing or vaguely comprehending others. For him, it was possible for 'logically separate acceptable justifications' to provide 'independently sufficient' grounds for punishment.

⁴⁷ Hart op cit note 3 at 1.

⁴⁸ John Rawls 'Two concepts of rules' (1955) Vol. 64 No. 1 *The Philosophical Review* 3-32 at 4-5.

⁴⁹ According to Walker, 'In practice ... sentences often appeal to different justifications in different circumstances or for different penalties. Thus, a judge might argue that certain offences (e.g. *mala in se*) should be punished for

DeGirolami,⁵⁰ agree that sentencing involves an evaluation of different theories of punishment, which are often in conflict. Such conflicts are inevitable, because the reasons that underpin each theory articulate legitimate social expectations about punishment.⁵¹ Hence, a penal system may rightly offer all of the theories as reasons for punishment and judges usually evaluate them when considering sentences. Their evaluations seek to achieve a balance between the goals that the theories articulate, such that a well-reasoned judicial sentence should reflect judicious attention to the relative impact that each theory or combination of theories should have on punishment.⁵² In the final analysis, the punishment should also reflect the judge's perception of the premium that the lawmaker places on the penal reasons behind a criminal statute.⁵³

Nigerian courts generally regard the balancing of competing penal aims to be an imperative, though sentencing decisions hardly show how this is done. In *Onyilokwu v Commissioner of Police*,⁵⁴ the High Court of Benue State in North-Central Nigeria somberly remarked that 'a good number of courts' were not giving adequate thought to sentencing principles.⁵⁵ In *Onuoha Kalu v The State*,⁵⁶ the Supreme Court of Nigeria was presented a unique opportunity to do what the Constitutional Court of South Africa did in *S v Makwanyane*.⁵⁷ In the latter case, the underlying objectives of punishment, the principles of sentencing and how these should influence sentencing decisions were robustly deliberated in the parties' arguments and the court's decision. An important issue for determination turned on whether the death penalty was 'a cruel, inhuman or degrading punishment within the meaning of section 11(2) of

retribution (or expressive reasons) while others (e.g. *mala prohibita*) should be punished only for utilitarian reasons. There is nothing inherently illogical in this argument, so long as one can offer an explicit and plausible distinction between situations in which each justification is appropriate ...' See Nigel Walker *Punishment, Danger and Stigma: The Morality of Criminal Justice* (1980) 30-31.

⁵⁰ DeGirolami has also argued that theories are 'never capable of expressing in fully satisfying fashion the complexity of the world that it means to describe, order, and judge. ... [There is] the possibility that rigidity in one's ideas about punishment will choke off the ability to recognize and exist in a position of tension between conflicting values and purposes'. See DeGirolami op cit note 41 at 278.

⁵¹ Hudson (1996) op cit note 2 at 3-4.

⁵² Ibid at 4.

⁵³ *S v Malgas* supra note 21 at 476 para G – 477 para H; 481 paras F-G.

⁵⁴ Supra note 40.

⁵⁵ Ibid at 54 para 25.

⁵⁶ [1998] 13 NWLR 531.

⁵⁷ Supra note 15.

[the South African] Constitution'.⁵⁸ In *Kalu*, however, which also involved the constitutionality of the death penalty, not once were the principles or objectives of sentencing mentioned.⁵⁹

Onyilokwu offers what is arguably one of the clearest elucidations of the principles of punishment in Nigeria. The court made two important acknowledgments. First, it recognised sentencing as a crucial phase at which major problems frequently arose in the criminal process. Secondly, it acknowledged that sentencers were often subject to idiosyncrasies or undisclosed elements that influenced the choice of punishment, even though they were irrelevant to the material facts of the case. These elements constituted impediments to the judicious use of discretion and potentially countermanded the public interest considerations that inform the content of particular penal prohibitions. A judge could, for instance, be influenced by unidentified biases or rumours, or some personal traits that incline him/her toward a severe, crusty or lenient disposition to the offender. Such idiosyncrasies are intensified by the burden of determining what proportion of the punishment should be allocated to retribution, reform or deterrence.⁶⁰

For these reasons, the court expressed the view that sentencing principles were necessary in order to exclude or limit the effect that subjective elements have on the choice of punishment. In the court's views, sentencing principles force sentencers to clarify their thoughts and resolve intervening emotions through a ratiocination of the process of awarding punishment, using clearly articulated statements to justify the object, quality and amount of the punishment selected. They also rationalise sentencing discretion and ease appellate reviews of sentences. Principles, however, must not be confused with the purposes of punishment. They only help to resolve the penal purpose(s) that should be dominant in a sentence. The principles, which include

⁵⁸ Ibid at 41 paras C-E.

⁵⁹ See chapter 4 section 4.1.

⁶⁰ *Onyilokwu* supra note 40 at 55 para 25 - 56 para -10; see also Nigerian Law Reform Commission op cit note 31 at 13, where the Commission wrote that sentencers bring an 'indefinable element' into sentencing, which influences the selection of punishment. These elements comprise the 'temperament and idiosyncratic views of the particular sentencing judge'.

mitigating and aggravating factors, are ancillary and the eventual sentence must be guided by the court's conclusions regarding the purpose(s) to which punishment must be directed.⁶¹

The *Onyilokwu* case comes across as a very important decision because rarely do Nigerian decisions articulate the principles and purposes of sentencing better. However, the decision has its limitations. It perpetuates a tradition of unbridled sentencing discretion⁶² that regards maximum and minimum sentences in penal statutes as little more than broadly demarcated guides within which sentencers may roam.⁶³ Thus, the court held that maximum and minimum sentences only serve as 'a good reminder that the legislature has given the court enough amplitude in which to operate'.⁶⁴ Although the court acknowledged that sentencing 'must be administered within the known principles if it is not to be taken as a sport, or as an unbridled stage in criminal proceedings',⁶⁵ this does little to rein in discretion, as courts have consistently applied discretion within an ample range that fosters sentence disproportionalities in Nigeria. The court could have situated its discussion of discretion within a principled structure that would ensure that the purposes and principles it enumerated enhanced sentencing consistency and placed reasonable limits on penal severity.

If sentencing decisions and academic writers in Nigeria are this fixated on traditional accounts of punishment, it behoves any study of sentencing in Nigeria to examine those accounts and understand why they are inadequate to respond to today's penal requirements, or facilitate the achievement of the sentencing framework that the PCRAJ proposed in 2006. Essentially, those accounts fall within the philosophical theories that have been offered in justification of punishment.

⁶¹ *Onyilokwu* supra note 40 at 55 para 25 and 56 para 20 - 57 para 10.

⁶² See AA Adeyemi 'Administration of justice in Nigeria: Sentencing' in AA Adeyemi (ed) *Law, Development and Administration in Nigeria* (1990) 109 at 110-111, 121, 140-141; JA Adefarasin 'Sentencing' in AA Adeyemi, (ed) *Law, Development and Administration in Nigeria* (1990) 159; Douglass op cit note 32.

⁶³ Aguda op cit note 36 at 213 para 561; see also s 382(1) of the Criminal Procedure Act, Cap. C 41 LFN 2004, which provides that courts have discretion to impose fines in lieu of imprisonment for an offence for which under written law, a sentence of imprisonment may be imposed, even though the law provides no specific authority to impose fine.

⁶⁴ *Onyilokwu* supra note 40 at p 57 paras 10-15.

⁶⁵ Ibid.

2.4 Traditional Justifications of Punishment

The intentionality involved in inflicting penal suffering provides the first premise that penal theorists almost unanimously agree on, that punishment needs to be justified against moral objections to it. ‘The clearest motivation for justifying punishment’, argued McAnany and Gerber, ‘lies in its negative and deprivative character ... [in] the seeming reciprocity of evils ... the paradox of following up pain with pain’.⁶⁶ But there may be further reasons as well. The pain of punishment extends beyond the offender to a network of relations that include friends and family who care for him and whose rights may be affected one way or the other. Running a system of corrections also comes with significant material and social costs to the public and to those charged with administering punishment.⁶⁷

Theories that have been offered to justify punishment are broadly classified into two: retributivism and utilitarianism. Retributivism asserts that offenders are punished because they deserve it, while utilitarianism maintains that punishment is necessary to deter crime, protect society from criminals and dispose offenders or members of the public to rule compliance. Utilitarian claims are forward looking in nature, in the sense that they focus on preventing future crimes. As such, they have been variously described as preventive, reductivist, instrumentalist or consequentialist theories. Retributivism on the other hand is backward looking, because its focus is on the deservedness of punishment. It looks back to punish crimes that have been committed. The primary contestation between both theories (often referred to as traditional, classical or philosophical accounts or theories of justification of punishment) is with regards to whether punishment should be imposed because it is deserved, or because it will prevent future crimes.⁶⁸

Debates about the justification of punishment aim to resolve three important questions: who should be punished; how much is enough punishment; and by what method should

⁶⁶ Rudolph J Gerber & Patrick D McAnany (eds.) *Contemporary Punishment: views, explanations and justifications* (1972) University of Notre Dame Press, Notre Dame 2; See also Richard W Burgh ‘Do the guilty deserve punishment’ (1982) Vol. 79 No. 4 *The Journal of Philosophy* 193-210 at 193. Burgh pointed out other political institutions that intentionally impose restrictions on citizens, but do not require justification as punishment does. However, penal suffering raises moral issues in a way that other privations do not.

⁶⁷ Berman (2008) op cit note 1 at 258 & 266.

⁶⁸ Hudson (1996) op cit note 2 at 3.

punishment be imposed?⁶⁹ The last two questions in particular raise practical issues regarding how to assign and measure criminal liability (i.e., distribute punishment).⁷⁰ Traditional accounts of punishment approached these questions by muddling them with questions about the moral basis of punishment and proffering an exclusive utilitarian or retributive response. However, modern approaches to justification decry this approach and call for clear distinctions between questions about distribution and questions about justification. According to such arguments, utilitarianism explains why a society maintains a system of rules that prescribes punishment for rule breaking, while retributivism justifies specific applications of punishment.⁷¹ The former calls for a preventative answer (i.e. a system of punishment exists to prevent rule breaking) while the latter explains why ‘punishment should be levied proportionately’.⁷² However, even when the case for a distinction has been effectively made, there are situations where these functions will overlap. This prompts the need for clarity ‘when rationales for punishment such as rehabilitation, deterrence or retribution are suggested as justifying principles, and when they are suggested as principles of distribution’.⁷³ The following discussion examines how traditional theories of punishment attempt to navigate these issues.

2.4.1 Utilitarianism.

Understanding utilitarianism requires exploring the concept within the broader theory of utility. According to Bentham,⁷⁴ utility is the principle that approves or disapproves of actions according to the tendency that they have to augment or diminish happiness, or to promote or diminish interests to which the happiness of an individual or community is tied. A utilitarian endorses an action if it has capacity to augment happiness and disapproves of it when it diminishes

⁶⁹ At a practical level, at issue in *S v Makwanayane* supra was whether the death penalty was a suitable method of punishment.

⁷⁰ Paul H Robinson ‘Hybrid principles for the distribution of criminal sanctions’ (1988) Vol. 82 No. 1 *Northwestern University Law Review* 19-42 at 34.

⁷¹ Hart, op cit note 3 at 8-9.

⁷² Andrew Von Hirsch ‘Proportionality in the philosophy of punishment’ (1992) Vol. 16 *Crime and Justice* 55-98 at 71-72.

⁷³ Hudson (1996) op cit note 2 at 6.

⁷⁴ Bentham op cit note 4 at 14-15.

happiness. Thus, utility provides the basis for all moral actions.⁷⁵ Mill's⁷⁶ views are similar; utility validates the moral rightness of actions in proportion to the extent that they promote the greatest happiness (where happiness signifies a state of pleasure and freedom from pain) or wrongness, to the extent that those actions tend to reverse happiness. Human actions kowtow to and take their character from ends to which they are subservient. Pleasure and freedom from pain are the only things desirable as ends. They are to be sought either for the pleasure that is inherent in that state of being, 'or as a means to the promotion of pleasure and the prevention of pain'.⁷⁷ Therefore, actions are right in proportion to the extent that they promote these ends.⁷⁸

Based on these constructs, Bentham and Mill offered their views on law and punishment. For Bentham,⁷⁹ the utilitarian measures the value of law in terms of how it is fitted to augment total happiness and exclude mischief. Punishment is therefore moralised if it prevents a greater evil.⁸⁰ A corollary of the principle is that punishment should seek the least drastic or least restrictive measure, calculated to deter offenders. For Mills,⁸¹ the urge to punish was spontaneous and natural, but must be subordinate to, and in conformity with the common good for it to be morally justified. How then, does the common good justify punishment? Mill's response situated individuals in a community of connected interests, in which a threat or injury to one person endangers the entire community. Therefore, every member of the community retains a common interest in expiating threats or injuries. Punishment is 'moralized' by this 'social feeling' and justified when it conduces to the common good.⁸² This utilitarian view of punishment also underpins the social defence theory, which posits that punishment has no value in and of itself, save in the protection that it gives to the public.⁸³

⁷⁵ Mark Tunick *Punishment: Theory and Practice* (1992) 69.

⁷⁶ John Stuart Mill *Utilitarianism* (2001) 10.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Bentham op cit note 4 at 14-15 & 134.

⁸⁰ Tunick (1992) op cit note 75 at 71.

⁸¹ Mill op cit note 76 at 49-50.

⁸² Ibid at 50-51. Mills argued that man's higher intelligence enables him to empathize beyond personal injury, and to situate his personal interest or injury in a community of interests held with other members of his community.

⁸³ Thomas Mathiesen *Prison on Trial* 3 ed (2006) 24, 55, 85; Matheisen discussed rehabilitation, incapacitation and deterrence as varieties of the social defence theory. All seek the same goal of protecting society.

2.4.1.1 *Utilitarian Theories of Punishment*

Utilitarian justifications of punishment assert that punishment deters crime, protects society from criminals, or disposes people to obeying the law. This section discusses four variants of the utilitarian theory.⁸⁴

I Deterrence

Bentham and Beccaria are among the foremost proponents of the theory of deterrence.

Bentham⁸⁵ believed that punishment is evil. Consistent with his utilitarian views, he maintained that punishment may only be utilised when it promised to exclude greater evil.⁸⁶ In other words, punishment should augment pleasure and prevent pain to the greatest majority. Believing that offenders are motivated to or deterred from breaking the law by the same human propensity to maximize pleasure and exclude pain, Bentham argued that punishment was justified by the surpassing utility of its threat; would-be offenders are deterred from committing criminal acts that would cause more pain, and the community is better for it. Mill's arguments were in tandem; punishment is unnecessary when it carried no promise of utility.⁸⁷

In the utilitarian account therefore, the emphasis is not on punishment in and of itself, but on the threat of pain that it holds forth.⁸⁸ Utilitarian accounts presume that offenders act rationally with knowledge of the probable consequences of the intended criminal action. The decision to offend is therefore predicated on a calculation of the anticipated benefits. The offender commits the crime if the anticipated benefit outweighs the pain of punishment.⁸⁹ As a

⁸⁴ This discussion does not examine one aspect of the utilitarian rationale, which is that punishing the innocent may be justified if it results in good consequences. This thesis accepts Rawls' view that no penal system is set up to punish the innocent, as an adequate response to this utilitarian position. See Rawls op cit note 48 at 10-13.

⁸⁵ Bentham op cit note 4 at 158.

⁸⁶ See Ross Harrison. 'Jeremy Bentham', in Ted Honderich (ed) *The Oxford Companion to philosophy* (1995) 85-88, available at <http://www.utilitarian.net/bentham/about/1995----.htm>.

⁸⁷ In Mill's words '[i]t would always give pleasure, and chime with our feelings of fitness, that acts we deem unjust should be punished, though we do not always think it expedient that this should be done by the tribunals. ... If we see that its enforcement by law would be inexpedient, we lament the impossibility, we consider the impunity given to injustice as an evil, and try to make amends for it by bringing a strong expression of our own and the public disapprobation to bear upon the offender'. See Mill op cit note 76 at 306-7. For a discussion of Mill's theory of utility and justice see Tim Mulgan *Understanding Utilitarianism* (2007) 26-7.

⁸⁸ See Phillip Bean *Punishment: A Philosophical and Criminological Inquiry* (1981) 396.

⁸⁹ Richard Brandt 'Rule Utilitarianism' in Gertrude Ezorsky (ed) *Philosophical Perspectives on Punishment*, (1972) 93-101 at 93-4; Brandt argued that it is the fear of punishment that deters offenders. See also RG Singer & MR Gardiner *Crimes and Punishment: Cases, Materials and Readings in Criminal Law* (1989) 82, 88-9.

principle for measuring the proportion between crime and punishment therefore, Bentham⁹⁰ suggested that the value of punishment must outweigh the profit of the crime. The greater the level of mischief or gain that the offender anticipates from the crime, the greater the severity of the sentence should be; the more habitual the offender's crimes become, the more severe the punishment should be, etcetera.⁹¹

Beccaria⁹² is reputed to have refined the deterrence theory.⁹³ He argued that the State's right to punish arises from the necessity of defending the general wellbeing from individual trespasses. As such, punishment must never go beyond what is absolutely necessary to preserve the general wellbeing. Otherwise, it becomes abusive and unjust.⁹⁴ At the heart of Beccaria's deterrence theory is a principle of moderation; the relief that is sought through punishment (e.g., crime reduction) must be sought through the least painful measures possible. This limiting element suggests a potential for frugality in deterrent punishments. In the final analysis however, deterrence invests heavily in the threat of punishment. It hopes that by holding forth the threat, potential offenders will desist from their criminal schemes, thereby making the actual imposition of punishment avoidable.⁹⁵

Deterrence is said to be specific when punishment is directed at a particular offender to dissuade him or her from reoffending. Here, the individual offender is the intended beneficiary and deterrence may be achieved by reforming, rehabilitating, or incapacitating him or her. The goal is to give the offender a foretaste of what awaits him should he or she reoffend.⁹⁶ Deterrence is general when the benefit accrues to the public as a whole. Here, the threat of punishment is directed at would-be offenders. Criminal statutes that threaten punishment are examples of general deterrence. An individual offender's punishment also serves as a message of deterrence to potential offenders.

⁹⁰ Bentham op cit note 4 at 141 – 142 & 145-146.

⁹¹ See also Tunick (1992) op cit note 75 at 73.

⁹² Cesare Beccaria *On crimes and punishments and other writings* Richard Bellamy (ed) (1995) 31.

⁹³ Bean (1981) op cit note 88 at 30.

⁹⁴ Ibid at 10-11.

⁹⁵ Hudson (1996) op cit note 2 at 20.

⁹⁶ Ibid at 24.

II Reformation and Rehabilitation

Reformation and rehabilitation theories seek the same objective – to remove the desire to offend from the offender and reintegrate him or her into society.⁹⁷ Consequently, the words tend to be used interchangeably. However, their claims are differentiable; while reform theorists claim that punishment, in itself, reforms the offender, proponents of rehabilitation contend that what changes the offender are therapies designed to alter behaviour and that punishment merely supplements therapies. The element of punishment consists in the obligatory nature of the treatment the offender undergoes.⁹⁸ The rationale behind reform-oriented and rehabilitation-oriented interventions can also be differentiated. Reform targets the will of the offender and presumes that the decision to offend is a rational choice. Its goal is to make the offender accept the wrongfulness of his or her action and to commit to not reoffending.⁹⁹ Conversely, the rehabilitation theory reconstructs the offender as someone acting without free will, who is not blameworthy for his criminal actions. His crime is a reaction to adverse criminogenic factors within his environment, or even ‘biological, physiological and psychological defects.’¹⁰⁰

⁹⁷ Ibid 26.

⁹⁸ See Bean op cit note 88 at 46. Bean uses the words interchangeably in explaining the reform theory of punishment; cf McTaggart, who draws his own distinction between Hegel’s theory of reform and reformation, by which he defines what Bean calls the rehabilitation theory. J Ellis McTaggart ‘Hegel’s Theory of Punishment’ *International Journal of Ethics* Vol. 6 (1896), 479-502 at 484-499.

⁹⁹ It is arguably for this reason that Hudson suggested that ‘reform can logically stand alongside deterrence’. Hudson (1996) op cit note 2 at 27. Garland and Young have also argued that ‘deterrence and reform were joint aims which were advocated simultaneously and coherently as early as Bentham and the [English] 1779 Prison Act’. See David Garland & Peter Young ‘Towards a social analysis of penality’ in David Garland & Peter Young (eds) *The Power to Punish: Contemporary Penalty and Social Analysis* (1983). That said, the origin of the theory is traced to Hegel, who maintained that punishment may be adapted to achieve deterrence or reformation, provided a prior foundation was laid in deserts. In Hegel’s theory, punishment ought to be understood as a measure that is imposed for the offender’s sake. This view entails that punishment is inflicted with an eye on two objects; to force the criminal into recognizing the validity of the law he has violated, and to bring about his repentance, or make him desist from his crime. Hegel’s theory held ‘rationality as the principled core of punishment’ and emphasized the instrumentality of pain in reforming offenders. See GWF Hegel *The Philosophy of Right* (2001) 90-91; see also Markus Dirk Dubber ‘Rediscovering Hegel’s theory of crime and punishment’, *Mich. L. Rev.* (1994) 1577-1621 at 1580; McTaggart op cit note 98.

¹⁰⁰ The rehabilitation theory’s focus on treatment assumes the offender is a victim of psycho-social factors that predispose him to crime. These factors could be poverty or inequality, and may include a dysfunctional background that may have impacted the offender’s development. Rehabilitationists assert that crime is a social disease that ought to be cured, not punished. The theory has two implications. First, it sees no link between guilt and punishment and the offender is not responsible for his actions. Society must assume responsibility for his cure, by redressing the predisposing factors, and by subjecting him/her to therapy. Second, there is no deserts or proportionality principle in the rehabilitation theory. Rule breaking cannot be the primary determinant of punishment, because the offender is not responsible for his actions. Elsewhere, rehabilitation has been described as the humanitarian theory. See

Beyond these differences, no very practical purpose is served by discussing the theories separately. Both seek the same objective and proponents of rehabilitation would also consider an offender to be ‘reformed’ when his or her values change, he or she accepts the wrongfulness of the conduct, becomes disinclined to reoffend as a result of the treatment and successfully reintegrates with society. However, rehabilitation has dominated contemporary debates about penal interventions that target behavioural change in offenders. Succinctly, rehabilitation requires punishment to be fitted to the offender’s criminological needs. Its critical strength lies in its emphasis on individualising punishment. Punishment, in this sense, is those therapeutic interventions that draw on scientific knowledge regarding human behaviour, which the offender must undergo to be cured of his or her criminal tendencies. The treatment is provided at a prison or hospital facility and is withdrawn when the offender has been cured.¹⁰¹

III Incapacitation

The aim of incapacitating prisoners is to protect the public from known offenders by physically rendering them incapable of reoffending. The most common form of incapacitation is imprisonment, but it includes the death penalty in countries that retain the penalty as a legal sanction.¹⁰² Incapacitation through imprisonment can go hand in hand with rehabilitation, because the latter requires periods of confinement to be implemented. However, the incapacitation theory is devoid of rehabilitative elements. Its emphasis is on protecting the public

Katherine M Campbell ‘Rehabilitation theory’, in Mary Borsworth (ed) *Encyclopedia of Prisons and Correctional Facilities* (2005) 831-4; see also CS Lewis ‘The humanitarian theory of punishment’ in Rudolph J Gerber & Patrick D McAnany (eds.) *Contemporary Punishment: Views, Explanations and Justifications* (1972), 194-199.

¹⁰¹ The rehabilitative ideal found impetus in socio-economic developments during the industrial revolution, which drove up a need for labour that was supplied by reintegrating offenders into society. However, the ideal and its practices concretised through ideas that were developed in the Jacksonian era, starting first with the emergence of systems of penitence, and evolving later into reformatory programmes that were delivered through educational and vocational training, and a strict, physically demanding regime. See Hudson (1996) op cit note 2 at 26-28; Karl Menninger ‘The crime of punishment’ in Michael Palmer (ed) *Moral Problems: A Coursebook* (1991) 101-103; see also Francis Allen ‘Legal Values and the rehabilitative ideal’ in Michael Tonry (ed) *Why Punish? How Much? A Reader on Punishment* (2011) 97-105 at 97-99; Marie Gottschalk *The Prison and the Gallows: The Politics of Mass Incarceration in America* (2006) 52-53.

¹⁰² Brandt op cit note 89.

from future crimes that an incapacitated offender might otherwise commit.¹⁰³ Often, its target is the dangerous or habitual offender who is deemed to have a high propensity for reoffending.¹⁰⁴

2.4.1.2 *Criticisms of Utilitarian Theories of Punishment*

Some weaknesses of the deterrent theory lie in the preconditions for it to work. The theory assumes that the decision to offend is a rational choice. For deterrence to work therefore, the law and particular instances of its enforcement must have been publicly communicated so as to forewarn potential criminals. Without prior communication, deterrence is ineffective. A second precondition is that punishment must be administered with celerity. It must follow the crime immediately¹⁰⁵ for it to reinforce the association between crime and punishment, thereby enhancing deterrence. Conversely, delaying punishment diminishes deterrence.¹⁰⁶ Thirdly, the chances of apprehension have to be strong, as it is the certainty of apprehension, rather than punishment itself, or the severity of it, that has the more deterrent effect.¹⁰⁷

Important as these preconditions are, they are not, in reality, always feasible. The presumption that offenders are calculating criminals does not always hold true. It certainly does not apply to crimes of passion; not all offenders know or understand the law and most certainly do not weigh the consequences of their criminal intentions before carrying them out. Indeed, empirical research suggests that rational decision making by offenders is improbable.¹⁰⁸ Besides, it is not always the case that criminal justice systems can ensure that all crimes are detected,

¹⁰³ Cyndi Banks *Criminal Justice Ethics: Theory and Practice* (2004) 117-8.

¹⁰⁴ Franklin E Zimring & Gordon Hawkins *Incapacitation: Penal Confinement and the Restraint of Crime* (1995) 3-10, 16; the authors explain that in its earliest uses in the Justinian era, imprisonment was only used to detain offenders until they could be punished, or to hold debtors until they paid their debts. Evidence that prison was used punitively began to appear in medieval times, but penal law in Europe continued to rule out imprisonment as a punishment. It was Bentham who gave imprisonment its first penological moorings. He identified imprisonment as one of three objects of penal justice, saying it rendered the offender incapable of committing the same offence in the same place. However, the earliest uses of prison suggest it was a preventive detention measure against habitual offenders, and was accordingly justified as a measure of public safety rather than 'traditional legal punishment'. Incapacitation became a general principle of punishment in the 1970s. But it has also been suggested that the rise of preventative approaches to punishment, such as incapacitation, is a corollary of the failure of the rehabilitation model. See Mathiesen op cit note 83 at 85.

¹⁰⁵ John Bowring (ed) *Deontology; Or, the Science of Morality, from the MSS of Jeremy Bentham* (1834) Vol. 1 108.

¹⁰⁶ Beccaria op cit note 92 at 48-49.

¹⁰⁷ Daniel S Nagin 'Deterrence in the twenty-first century' (2013) Vol. 42 No. 1 *Crime and Justice* 199-263 at 206.

¹⁰⁸ See Tomislav V Kovandzic, Lynne M Vieraitis & Denise Paquette Boots 'Does the death penalty save lives? New evidence from statistics panel data, 1977 to 2006' (2009) Vol. 8 Issue 4 *Criminology and Public Policy* 803 - 843 at 833-837.

reported and punished. If deterrence were solely based on the efficacy of crime detection alone, it diminishes when crime detection capacities are deficient.¹⁰⁹ Another objection to deterrence asserts that for true individual deterrence to be achieved, punishment must be individualised with the object of rehabilitating the offender. This may lead to considerable disparities and immoderation in sentences, which could impede general deterrence.¹¹⁰

Rehabilitation and incapacitation have also attracted criticisms for failing to do substantial justice.¹¹¹ In rehabilitative incapacitative regimes, an offender may only be released when he is deemed to be cured or ceases to be a threat, and this is usually after indefinite or prolonged incarceration. This easily leads to exacting punishment at a value that is higher than the gains of the crime, with little regard to the gravity of the offence itself. Yet another criticism attacks incapacitation's fixation with the concept of dangerousness, the idea that the habitual, violent or criminally insane offender has a high propensity to reoffend. Therefore, society must protect itself by keeping such offenders out of circulation, through incarcerations or institutionalisations for long periods of time. The problem with the scheme arises from having to determine dangerousness, as a predictor of future criminality. The science of predicting criminality is inaccurate. As a concept, dangerousness has been described as 'so vague and plastic, [and] its implementation so imprecise, that it could not substantially reduce the ... excessive use of punishment'.¹¹² There are moral dilemmas associated with the concept. False predictions of dangerousness are frequent¹¹³ and incapacitation, in itself, has a tendency to punish for supposed predilections to offending. That is, the offender is punished not just for an offence he has committed, but for one that he has not and may in fact never commit if he were

¹⁰⁹ Beccaria op cit note 92; Paul H Robinson, 'Criminal justice in the information age: a punishment theory paradox', *Ohio State journal of criminal law*, Vol.1 (2004) 683-7 at 685.

¹¹⁰ Hudson (1996) op cit note 2 at 24; it could create the perception that the criminal justice system is unfair, thereby defeating the aims of deterrence.

¹¹¹ Robinson (2004) op cit note 109.

¹¹² Morris (1974) op cit note 23 at 1165.

¹¹³ Mathiesen has argued that the more prediction achieved, the higher the chances that incapacitation will be achieved, and vice versa. With lower accuracy frequently the case, the increasing tendency is to punish simple offences more severely than unusual, violent crimes, based on flawed calculations of the risks of recidivism, which tends to predict high risks reoffending for simple offences than for unusual, violent crimes. As a result, large numbers of minor offenders who may never commit dangerous crimes end up being incarcerated on the pretext of keeping a few dangerous ones out of circulation. See Mathiesen op cit note 83 at 79-83; Morris (1974) op cit note 23 at 1169-1173.

not incarcerated. Such punishments cannot be justified on grounds of public protection. They offend the principle of fairness: their decidedly forward looking nature must ignore considerations of commensurate justice in order to punish an offender for a yet-to-be-committed offence.¹¹⁴

Such punishments are underserved and must incline towards severity to achieve deterrence. The appropriate level of severity becomes whatever is necessary to deter.¹¹⁵ This might, in individual cases, mean leniency or undue severity. On the severe side, rehabilitative and incapacitative punishments force prisoners to endure longer prison terms than their crimes deserve. This problem, it has been argued, shows that utilitarian theories do not offer a practical guide for placing acceptable limits on punishment. Although rehabilitationists may counter argue that theirs is the only theory that integrates crime reduction and the offender's right to return to society,¹¹⁶ no conclusive evidence supports the theory's effectiveness. Its inability to arrest recidivism led to a radical decline in its utility in the 1970s.¹¹⁷

Another attack on utilitarian theories relies on a considerable body of empirical data that challenge the claim that punishment deters criminals or prevents crime. Some of these reports use findings that show that the death penalty has not reduced murder rates.¹¹⁸ Others point to the

¹¹⁴ See Banks op cit note 101; Hudson (1996) op cit note 2 at 26 & 33-5.

¹¹⁵ Robinson (2004) op cit note 107 at 100-101.

¹¹⁶ Hudson (1996) op cit note 2 at 20; Anthony Ellis 'A deterrence theory of punishment' (2003) Vol. 53 No. 212 *The Philosophical Quarterly* 337-351 at 338.

¹¹⁷ See Zimring & Hawkins op cit note 102 at 7-10; EA Bottoms 'An introduction to the coming crisis' in EA Bottoms & PH Preston (eds.) *The Coming Penal Crisis: A Criminological and Theological Exploration* (1980) 1-24 at 7-10. In the United States, the arguments have gone back and forth. In *Mistretta v United States* (1989) 488 US 361, the United States Supreme Court reasoned that the soundness of rehabilitation had been questioned and regarded as unattainable in most cases. However, rehabilitationists have argued that the conditions were hardly ever right for the theory to work, and that where conditions were right, 30 – 40% offenders did not recidivate. See Francis T Cullen 'The twelve people who saved rehabilitation: How the science of criminology made a difference' (2005) Vol. 43 No. 1 *Criminology* 1-42; Rick G Sarre 'Beyond 'what works?' A 25-year jubilee retrospective of Robert Martinson' (2001) Vol. 23 No. 1 *Australian and New Zealand Journal of Criminology* 38-46; Iain Murray 'Making rehabilitation work: An American experience of rehabilitating prisoners' (2002) available at <http://www.civitas.org.uk/pdf/Rehab.pdf>, accessed 18 April 2014. However, some rehabilitationists have sought to modify the theory, by seeking to replace indeterminate sentences with fixed sentences. See Eli Lehrer 'Ex-convicts in society' (2003) Issue 153 *Public interest* 124-7; Banks op cit note 101.

¹¹⁸ Erlich, and Dezhbakhsh *et al*, in separate statistical reviews of execution in the United States from 1933-1967 and 1977-2000, claimed that the death penalty saved eight to eighteen potential victims. See Isaac Erlich 'The deterrent effect of capital punishment: A question of life and death' *The American Economic Review*, Vol. 65 No. 3 (1975) 397-417; Hashem Dezhbakhsh, Paul H Rubin, & Joanna M Shepherd 'Does capital punishment have a deterrent effect? New evidence from post moratorium panel data' (2003) Vol. 5 No. 2 *American Law and Economics Review*

shortcomings in the studies to illustrate that there is no conclusive evidence regarding the deterrent value of punishment.¹¹⁹ Generally therefore, there is insufficient evidence to support utilitarian claims that punishment reduces crime. Even when utilitarian punishments can be assumed to work, the high social costs of implementing them undermines the utilitarian principle of parsimony.¹²⁰

2.4.2 Retributivism

Claims that the only basis for subjecting a person to punishment is that he broke the law,¹²¹ or that punishment is payback for moral lapse,¹²² or that only the guilty may be punished¹²³ all iterate the underlying principle in traditional accounts of retributivism. The claims assert a necessary ‘connection between crime and punishment’, so that ‘punishment is punishment only when it is deserved’.¹²⁴ Retributivism regards punishment as having intrinsic value, validated by its innate appeal to moral persuasions regarding right and wrong and grounded in the moral, intuitive belief that an evil act must be punished.¹²⁵ In retributivism, punishment is grossly

344-3761. However, their claims were challenged by Fagan, who claimed the studies used flawed and limited data. See Jeffery Fagan ‘Deterrence and the death penalty: a critical review of new evidence’ (2005) Testimony to the New York State Committee on Codes, Assembly Standing Committee on Judiciary and Assembly Standing Committee on Correction: Hearings on the future of capital punishment on the State of New York, available at <http://www.deathpenaltyinfo.org/FaganTestimony.pdf>, accessed 18 November 2014. In Britain there is scant research on the deterrent effect of death penalty on murder. See Jon Silverman ‘How punishment affects crime rates’, BBC News, November 21 2005, available at http://news.bbc.co.uk/2/hi/uk_news/4457402.stm, accessed 13 July 2012.

¹¹⁹ Aaron Chafin, Amelia M Haviland & Steven Raphael ‘What do studies tell us about a deterrent effect of capital punishment? A critique of the literature’ (2013) Vol. 29 *J Quant Criminol* 5-43 at 41-42.

¹²⁰ Robinson (2004) op cit note 109 at 685. Robinson alluded to high economic, human and moral costs associated with preventative incarceration. These costs are inflated by high and misleading positive prediction rates, resulting in high incarceration rates. These, including the social dislocation that prisoners suffer, make incapacitation less appealing.

¹²¹ JD Mabbott ‘Punishment’ (1939) Vol. 48 No. 190, *Mind*, 152-167 at 158; see also Mirko Bagaric *Punishment and Sentencing: A Rational Approach* (2001) 38.

¹²² Benn op cit note 3 at 333.

¹²³ AM Quinton ‘On punishment’ (1954) Vol. 14 No. 6 *Analysis* 133-142 at 134 & 136.

¹²⁴ Francis Herbert Bradley *Ethical Studies* 2 ed (1927) 26; FH Bradley ‘Some remarks about punishment’ (1894) Vol. 4. No. 3 *International Journal Of Ethics* 269-284 at 273.

¹²⁵ Alfred Cyril Ewing *The Morality of Punishment* (1929) 14.

inappropriate when it is administered other than because it is deserved.¹²⁶ The theory firmly repudiates the utilitarian claim that punishment is justified by good consequences.¹²⁷

Among the foremost theorists in classical retributivism are Kant and Hegel.¹²⁸ Kant¹²⁹ argued that punishment is justified only when it is imposed on a person because he or she broke the law. He rejected the utilitarian thesis on one principal ground: punishing a person with a utilitarian object in mind treats that person as ‘a means subservient to the purpose of another’.¹³⁰ Such punishment dispenses with the requirements of justice, or of punishing a person according to his or her deserts. Kant’s arguments also turned on the right to punish. The right, he argued, derives from the right that society reserves to avenge actions that harm or threaten its interests. Punishment is therefore a ‘categorical imperative’, a phrase that connotes that a person must first be found ‘guilty and punishable’¹³¹ before punishment can be administered.

In Hegel’s retributivism, punishment is inherently just because it expresses the offender’s will. The theory regards the offender as a moral agent who is capable of acting with reason and volition, and who makes a rational choice to break rather than keep the law, knowing full well the consequences that will follow. Therefore, punishment honours the rational choice the offender made. Denying him punishment denies him that honour. It injures his worth as a moral agent.¹³² There are certain corollaries to this theory: first, an offender is deemed to have willed the punishment he receives for breaking a rule; secondly, the argument that punishment is willed presupposes a right to be punished. Thus, the pain of punishment is the offender’s by right, because he willed it.¹³³ How then does society acquire the right to honour the offender’s will? Hegel argued that crime is a negation of right that must be negated;¹³⁴ otherwise the negation that

¹²⁶ Ibid at 27.

¹²⁷ Jeffrie G Murphy ‘Marxism and retribution’ in Simmons, Cohen & Cohen et al (eds) *Punishment* (1995) 3.

¹²⁸ Simmons, Cohen & Cohen et al (eds) *Punishment* (1995) viii.

¹²⁹ Immanuel Kant *The philosophy of law: An exposition of the fundamental principles of jurisprudence as the science of right* (2002) 195.

¹³⁰ Ibid at 195.

¹³¹ Ibid at 195-6.

¹³² Hegel op cit note 99 at 91-92.

¹³³ Ibid.

¹³⁴ Ibid at 83-90; see particularly 89-90; see also Dubber op cit note 99 at 1581-1582.

is implicit in the crime is validated.¹³⁵ Punishment negates the negation of the victim's right and restores the status quo before the offence was committed.¹³⁶ To restore the status quo, punishment must be proportionate to the crime, so that equivalent values are achieved between the criminal damage and the penal suffering therefor.¹³⁷ A variant of this theory regards the inference that punishment can undo wrongdoing as rather absurd. Crime cannot be undone. Punishment may only undo the false message that the offender expresses through his crime that the victim is of less worth. Punishment restores that worth.¹³⁸

According to Morris,¹³⁹ the right to punishment is an incident of the offender's right to be treated as a rational person. Explaining this point, he contrasted regular systems of punishment with systems that proffer therapeutic responses to offenders, and observed that while the former respects an offender's choice, the latter does not. The right to punishment also implied a right to the institutions and practices associated with it,¹⁴⁰ as well as the benefits attached to the system, which afford the offender the ability to predict the probable consequences to his actions and the dignity of choosing which of those consequences should follow. Punishment merely responds to and respects this choice. Therapeutic systems on the other hand do not affirm the offender as a rational person, but subject him or her to the indignity of having the consequences of his or her choice determined by others. This diminishes an offender's right to be treated as a rational person because the logical consequences of his or her choices are not allowed to take effect. In

¹³⁵ Peter G Stillman 'Hegel's idea of punishment' (1976) Vol. 14 No. 2 *Journal of History of Philosophy* 196-182 at 171-2.

¹³⁶ Hegel op cit note 99 at 89; see also George G Brenkert *Marx's ethics of freedoms* (1983) 188-9.

¹³⁷ Hegel op cit note 99 at 92-94; in Hegel's account, proportionality does not mean external equalization of crime with the punishment. The crime carries its own negation or punishment. Thus, punishment should seek a qualitative and quantitative penal value that is analogous to the exchange of equivalent values in contract law.

¹³⁸ Jeffrie G Murphy 'Repentance, mercy and communicative punishment' in Rowan Cruft, Matthew H Kramer & Mark R Reiff (eds) *Crime, Punishment and Responsibility: The Jurisprudence of Anthony Duff* (2011) 34-5. Murphy restates the principle as follows: 'What ... is ... annulled ... is the message of disrespect for the victim and ... the legal order of the relevant moral community.... [the] message that the victim is of less than equal value is emphatically repudiated and another message – that of the full value of the victim as an equal citizen – is emphatically asserted'.

¹³⁹ Herbert Morris 'Persons and Punishment' Vol. 52 No. 4 (1968) *The Monist* 475-501 at 485-7.

¹⁴⁰ Ibid at 485-6.

Morris's views therefore, the right to punishment is fundamental, natural, immutable and unqualified.¹⁴¹

Traditional retributivists do not necessarily reject good consequences in punishment, but they resist using good consequences as a basis for punishment. Kant¹⁴² and Bradley,¹⁴³ for example, agree that consideration may be given to good consequences, or that it may be expedient to adjust punishment to a useful object, but this may only occur after guilt has been positively established. In retributivism, 'doing justice ... needs no further justification'¹⁴⁴ because punishment, in itself, is the end. It corresponds with justice.¹⁴⁵ Retributivism's insistence on establishing guilt repudiates any contemplation that futuristic purposes may provide a basis for imposing punishment.¹⁴⁶

There are different accounts of retributivism. In one account, punishment satisfies legitimate feelings of indignation and resentment, which Bradley describes as 'salutary and worthy of cultivation'.¹⁴⁷ Another account maintains that punishment expresses or communicates society's indignation to the offender.¹⁴⁸ Whatever the account, retributivism asserts that punishment must be deserved and administered in proportion to the offender's blameworthiness. This assertion points out two important principles in retributivism, namely just deserts and proportionality.

¹⁴¹ Ibid at 490 & 492-6.

¹⁴² Kant op cit note 129 at 196.

¹⁴³ Bradley (1927) op cit note 124. Bradley wrote: 'We may have regard to whatever considerations we please – our own convenience, the good of society, the benefit of the offender; we are fools, and worse, if we fail to do so. Having once the right to punish, we may modify the punishment according to the useful and the pleasant, but they are external to the matter, they cannot give us a right to punish, and nothing can do that but criminal desert'. See also Quinton op cit note 123 at 134.

¹⁴⁴ Paul H Robinson 'How Psychology is changing the punishment theory debate' (2007) *Faculty Scholarship Paper* 132 94, available at http://scholarship.law.upenn.edu/faculty_scholarship/132, accessed 8 July 2012.

¹⁴⁵ Bradley (1927) op cit note 124 at 28.

¹⁴⁶ Mabbott op cit note 121 at 153.

¹⁴⁷ Bradley (1927) op cit note 124 at 30-31.

¹⁴⁸ Henry M Hart 'Criminal punishment as public condemnation' in Rudolph J Gerber and Patrick D McAnany (eds) *Contemporary Punishment: Views, Explanations and Justifications* (1972) 12-15. Hart wrote that crime is 'conduct which, if duly shown to have taken place, will incur the formal and solemn pronouncement of the moral condemnation of the community'.

2.4.2.1 *Measuring Punishment under Traditional Retributivism*

The claim that punishment negates wrongdoing presumes that punishment restores the moral balance that was disturbed by the offending conduct.¹⁴⁹ The balance is described as the equilibrium between benefits and burdens,¹⁵⁰ or the ‘proportion between welfare and well doing’.¹⁵¹ It is grounded in the idea that the general happiness of a society is guaranteed when each member of the society observes the rules that secure that happiness, as his or her contribution to the general wellbeing. Rule breaking upsets the balance, but punishment restores it. Kant¹⁵² illustrated the balance using the system of property relations, in which ownership is established on legal rules that impose benefits and burdens that secure property rights. The burden restrains actions that threaten the security of property, so that all can enjoy the security of their property (the benefit). Stealing upsets the balance; in theft, the thief rejects the burden while purporting to retain the benefit. He gains undue advantage over others, but threatens the general security of property by his act. Punishment reverses this undue advantage and restores the balance.¹⁵³

By what measure then, does punishment restore the balance? Kant proposed a ‘Principle of Equality, by which the pointer of the Scale of Justice is made to incline no more to one side than the other’.¹⁵⁴ In other words, the offender should be made to experience the same measure of pain caused by his or her act. Kant argued that the right to exact such pain derives from *jus talionis*, the right of retaliation. The right provides a regulating principle for measuring ‘the quality and quantity of a just penalty’¹⁵⁵ and for ensuring that punishment kowtows to the ‘pure

¹⁴⁹ Gertrude Ezorsky ‘The ethics of Punishment’ in Gertrude Ezorsky (ed) *Philosophical Perspectives on Punishment* (1972) xi-xvii at xvii.

¹⁵⁰ Morris (1968) op cit note 139 at 478.

¹⁵¹ Immanuel Kant ‘Justice and punishment’ in Gertrude Ezorski (ed) *Philosophical Perspectives on Punishment* (1972) 102-106.

¹⁵² Kant (2002) op cit note 129 at 196-198.

¹⁵³ Dolinko op cit note 1 at 406 & 416. According to Dolinko ‘criminal laws are constraints on behaviour whose observance benefits everyone by ensuring that each individual will enjoy a sphere of autonomous action that is beyond interference by others. By appropriating these constraints, the criminal “has something others have – benefits of the system – but by renouncing what others have assumed, the burden of self-restraint, he has acquired an unfair advantage.” ... Punishing such a criminal deprives her or him of this “unfair advantage,” thereby restoring proper balance of benefits and burdens’.

¹⁵⁴ Kant (2002) op cit note 129 at 196.

¹⁵⁵ Ibid at 196.

and strict' requirement of justice – to treat like cases alike.¹⁵⁶ Kant essentially advocated a principle of equalisation, to level off punishment with the crime for which it is imposed and ensure that punishment is proportionate to the degree of 'internal wickedness [or moral lapse] manifested in the crime'.¹⁵⁷ This also is the sense conveyed in Morris' claim that punishment 'was related to maintaining and *restoring a fair distribution* of benefits and burdens' (emphasis supplied).¹⁵⁸

Two principles emerge from the foregoing. The first, just deserts, asserts that punishment must be deserved. It is essentially a moralising principle. The second, the principle of proportionality, requires the pain of punishment to be comparable to the pain or damage caused by the offence. Both principles are prominent and necessary features in classical retribution. In the classical tradition however, no clear distinction is drawn between deserts as a justifying premise for punishment and proportionality as a distributive principle.

In summary, deserts and proportionality iterate the justice of balancing penal severity with offence seriousness,¹⁵⁹ with the latter being a measure for evaluating moral culpability. So then, the intensity of punishment depends on the degree of moral wrong. This 'like for like' measure implicitly conveys the notion that deserts or moral wrongness can be possessed in 'different degrees'.¹⁶⁰

¹⁵⁶ Ibid at 196-7.

¹⁵⁷ Ibid at 198. The argument presupposes that in addition to meeting the physical requirements of the offence, the mental element must be present, otherwise the offender is not culpable. Strict liability offences are an exception to the mental requirement, as they do not require moral fault or overt manifestation of criminal intent. Punishment is justified by the fact that the law is broken. Strict liability offences focus on results, dispense with deserts, presume culpability without the rigors of legal proof, and admit no excuses to liability. Offences in the category include offences against public welfare, statutory rape, possession of narcotics, etc. See R Wasserstrom 'Strict liability in the criminal law' in Gertrude Ezorsky (ed) *Philosophical Perspectives on Punishment* (1972) 196-212 at 210; Vera Bergelson 'A fair punishment for Humbert Humbert: Strict liability and affirmative defences' (2011) Vol. 14 No. 1 *New Criminal Law Review* 55-77 at 58- 60.

¹⁵⁸ Morris (1968) op cit note 139 at 483.

¹⁵⁹ KC Armstrong 'The right to punish' in Gertrude Ezorsky (ed.) *Philosophical Perspectives on Punishment* (1972) 136.

¹⁶⁰ Thom Brooks 'Punishment and Retribution by Leo Zaibert' (2007) Vol. 10 No. 2 *Criminal Law Review: An International and Interdisciplinary Journal* 311-314 at 311; see also Mabbott op cit note 119 at 162. Mabbott argued that offenders 'differ widely on the degree of wickedness and responsibility, where degrees of responsibility may for instance stand for degrees of complicity in crime'.

2.4.2.2 *Criticisms of Traditional Retributivism*

There are several objections to retributivism. One of these is a utilitarian criticism of its efficacy as a theory of justification. The criticism maintains that the theory merely elucidates the meaning of punishment by illustrating the logical connection between crime and penal suffering, as between cause and effect. Thus stated, the theory responds to the question of when punishment may be administered, and should be distinguished from rules that justify specific applications of punishment in individual cases. The latter function responds to moral objections to punishment and is best resolved by utilitarian accounts.¹⁶¹ In a related context, Flew¹⁶² argued that just deserts merely rehashes and clarifies factual claims regarding the meaning of punishment and offers no constructive contributions to the debate about justification. However, the objection stretches the point. For one thing, Kant and Bradley were as keen as any utilitarian with proffering a moral basis for punishment. This is evident in the relationship they found between crime and liability, which suggests that an offender must be morally culpable before he or she can be punished.¹⁶³ Thus, retributivists may rightly assert that the justification for punishment is evident in the word, or that punishing wrongdoing is the appropriate thing to do. This assertion essentially maintains that punishment is self-justifying and elucidates the fact that in debates about punishment, it is particularly difficult to separate the meaning from the reason.¹⁶⁴ At some point in the debate, even utilitarians are forced to concede that punishment must be deserved.¹⁶⁵

The second objection attacks retributivism's model for allocating punishment, namely the principle of equality (or equivalence). It rejects the principle for requiring punishment to literally match the crime in its physical and non-physical components. This is tantamount to seeking the measure of punishment in the crime itself. It is an improbable measure, because there is no

¹⁶¹ Quinton op cit note 123 at 133-134, 136-7; see also Leo Zaibert *Punishment and Retribution* (2006) 73-5.

¹⁶² Flew op cit note 1 at 299.

¹⁶³ See Bean op cit note 88 at 14.

¹⁶⁴ Thomas McPherson 'Punishment: Definition and justification' (1967) Vol. 28 No. 1 Analysis 21-27 at 26.

¹⁶⁵ According to Flew, 'in general, there must be a retributive element in punishment, inasmuch as punishments must be of an offender for an offence'. However, he rejected the idea that retributivism can supply an exclusive justification for punishment. The theory may be compelling for most cases of punishment, but it is not necessarily and logically applicable in all cases. Examples of crimes where retribution may be excluded include strict liability offences, or crimes of criminal negligence, where criminal intent is irrelevant. See Flew op cit note 1 at 306; see also Wasserstrom op cit note 157.

‘conceivable’ calculus ‘for equating pain with pain’.¹⁶⁶ Individuals experience pain differently, even when the physical elements are identical.¹⁶⁷ Even though Kant conceded that not all cases will meet the equivalence principle,¹⁶⁸ he nevertheless argued that the pain of punishment must be commensurate in degree to the pain caused by the crime, according to the right of retaliation he propounded. The problem with this, is that he offered no meaningful account of the extent to which the right should be taken.¹⁶⁹ This, arguably, is traditional retributivism’s greatest hurdle. Even if *jus talionis* is interpreted as not requiring ‘exact likeness in all respects’¹⁷⁰ but as offering a general scheme for ‘specifying ... what the costs in life and labour of ... crime might be, and how the costs of punishment might be calculated, so that retribution could be understood as preventing criminal profit’,¹⁷¹ it would still be beset with real challenges of measuring penal severity.

Yet another difficulty associated with measuring penal severity arises from retributivism’s reliance on moral intuition. Bradley describes it as follows:

If you are to estimate morally, then, in proportion as the moral standard grows more inward, the genuine facts become inaccessible. And it becomes less and less possible anywhere to measure exactly moral responsibility. But with a more external standard, you are left in doubt if your estimate is genuinely moral. And in particular you have to struggle with the task of drawing in each case a line between wilful badness and unwilled disease. Such internal difficulties are a serious hindrance to retribution. If you can acquire the right to punish only by proving moral crime, it seems hard to be sure that this right is really secured. Thus the principle is good, but its application is seriously embarrassed.¹⁷²

Measuring wickedness entails assessments of moral character, which would necessarily involve difficult intuitive processes. What retributivism offers here, is a rough guide to the arduous task of distributing punishment.¹⁷³ There are yet other difficulties. The criminal law punishes legal wrongs and not moral wickedness, and while all legal breaches would attract

¹⁶⁶ Benn op cit note 3 at 335-337, See also Quinton op cit note 123 at 135-136.

¹⁶⁷ Benn op cit.

¹⁶⁸ For instance, perjury cannot be punished with perjury, or rape with rape.

¹⁶⁹ Peter Koritansky ‘Two theories of retributive punishment: Immanuel Kant and Thomas Aquinas’ (2005) Vol. 22 No. 4 *History of Philosophy Quarterly* 319-338 at 324.

¹⁷⁰ Jeffrie G Murphy ‘Three mistakes about retributivism’ (1971) Vol. 31 No. 5 *Analysis* 166-169 at 167

¹⁷¹ Ibid.

¹⁷² Bradley (1894) op cit note 124 at 274.

¹⁷³ Bean op cit note 88 at 86.

punishment, not all moral wrongs do.¹⁷⁴ Also, reliance on moral wickedness appeals to popular moral convictions that shift with time. It provides a variable premise to found a system for allocating punishment.¹⁷⁵ It has also been suggested that retributivism's support for punishment as an end in itself portrays a bent towards vindictiveness.¹⁷⁶

2.5 How Do Traditional Accounts of Punishment Impact Sentencing in Nigeria?

As noted earlier in this chapter, sentencing literature in Nigeria has recycled traditional accounts of punishment, without more. How then have contestations between these accounts impacted the development of Nigeria's sentencing jurisprudence? As pointed out in chapter one, sentencers have tended to not offer reasons for sentences they impose. Even if they were to rationalise the objects of punishment, their ability to do so could be impeded by limitations in traditional accounts of punishment. Some of the cases accessed during this research showed that sentencers referred to the objects in the classical sense. Since neither classical utilitarianism nor retributivism can offer an acceptable basis for matching crime with punishment, Nigerian sentencers who rely on the accounts may well face the same predicament. A case in point is *Onyilokwu v Commissioner of Police*,¹⁷⁷ where the court acknowledged and briefly discussed the objects of sentencing, saying they were from sentencing principles. In the end, it is not clear that the objects or principles were used to determine the sentence imposed.

The inability of utilitarian and retributivist theories to provide a satisfactory account of punishment resulted in a range of hybrid theories that sought to reconcile the conflict between both theories. The core principles in these accounts are discussed below.

2.6 Hybrid Accounts of Punishment

Hybrid theories seek to reconcile the antinomy between utilitarianism and retributivism and find an acceptable formula for allocating punishment.¹⁷⁸ The theories reconstruct the debate by

¹⁷⁴ Benn op cit note 3 at 327-328.

¹⁷⁵ Flew op cit note 1 at 298 & 306

¹⁷⁶ Murphy (1971) op cit note 170; Bean op cit note 88 at 28.

¹⁷⁷ Supra note 40.

¹⁷⁸ The approaches vary. Some regard compromise and hybrid theories as separate approaches to finding a middle ground. See Hudson (1996) op cit note 2 at chapter 4. Others approach 'compromise' and 'hybrid' as

showing that no account of punishment need be exclusive, and by re-directing the focus in each theory in order to overcome its main weaknesses. In a sense, the emergence of hybrid theories acknowledged there are strengths in utilitarian and retributivist claims.¹⁷⁹

Hybrid (or compromise) theories start with the premise that utilitarianism and retributivism address different questions about punishment; the former seeks an account of the general justifying aim of punishment, while the latter explains specific instances of the application of punishment.¹⁸⁰ Conflicts are avoided when these questions are kept separate.¹⁸¹ There are three useful points to note here. First, the functions allocated to each theory also attempt to skirt the weakness in each. For utilitarianism, the weakness lies in its inability to offer a guiding principle on how to distribute punishment; for retributivism, it is the inability to satisfactorily explain why a system of binding rules that promises punishment for infringements is necessary.¹⁸² Secondly, the functions are allocated to show those aspects of punishment that each theory explains better. Thirdly, the allocations emphasise a complimentary relationship between the theories. Thus, compromise or hybrid theorists seek to show that utilitarianism and retributivism play distinct but complimentary roles in explaining punishment. While utilitarianism is better able to explain why society maintains a system of binding rules, retributivism does better at explaining why a particular action ought to be punished under the system of rules. Thus, hybrid theorists aim to show how no theory of punishment can be tenable when it is wholly utilitarian or retributive.¹⁸³

interchangeable terms that speak of the same thing. See Bagaric op cit note 119 at 48. In this dissertation, compromise and hybrid theories are addressed as belonging to the same genre of middle ground theories.

¹⁷⁹ Hudson (1996) op cit note 2 at 57; Bagaric op cit note 121 at 48.

¹⁸⁰ Philosophers differ in how they frame the question but the same sense is generally communicated. For Hart, the questions are 'what justifies the general practice of punishment?' on one hand, and 'to whom and how severely may punishment be applied?' Rawls also illustrated 'the importance of the distinction between justifying a practice and justifying a particular action falling under it,' while Quinton distinguished between establishing rules whose infringement attract punishment from specific instances of applying the rules. Rawls and Quinton acknowledge the distinctness of the ends to which the questions should be directed. See Rawls op cit note 48 at 3; Quinton op cit note 123 at 134.

¹⁸¹ See Benn op cit note 3 at 326.

¹⁸² Hudson (1996) op cit note 2 at 58.

¹⁸³ See Bagaric op cit note 121 at 48.

Rawls'¹⁸⁴ account of how the separation works is helpful. Punishment is an institution that is established by a system of rules and it includes those processes and stations involved in the criminal process, including the rules that proscribe conduct, regulate the judicial process and prescribe punishments. This obviously utilitarian construct embodies the function of the lawmaker, who makes law with an eye to the future, in furtherance of the public interest. The lawmaker grapples with questions regarding what actions ought to be punished. Retributivism, on the other hand, embodies the function of the judge, who looks back to the wrongful conduct and applies the penalty prescribed in the infringed rule on the guilty offender.¹⁸⁵ According to this construct, the institution of punishment affirms the deserts premise in retributivism, sets limits regarding who may be punished and provides guidance regarding the quantum of punishment.¹⁸⁶ In Rawls' theory therefore, utilitarianism and retributivism become the two sides of one coin. Utilitarianism functions with a general aim to moderate behaviour and holds forth the threat of sanction for that purpose. Retributivism, on the other hand, deals with specific instances when those threatened sanctions may be imposed. Hart¹⁸⁷ saw a complementary relationship in this arrangement and argued that the pursuit of the general aim ought to be moderated by deference to the principle that punishment should be deserved.

Hybrid theories also attract criticisms. According to one criticism, hybrids establish a hierarchical relationship between utilitarianism and retributivism, which tends to prioritise the purposes of one theory while marginalising, diminishing or contradicting the requirements of the other.¹⁸⁸ One attempt to respond to this criticism resulted in hybrid accounts that assigned 'equal weight' to retributivism and utilitarianism. However, these accounts were criticised for '[yoking] different considerations together in an ad hoc manner'.¹⁸⁹ Objections to hybrid accounts show how they never completely resolve contentions between utilitarianism and retributivism. Fortunately, however, other hybrid versions have emerged which offer something close to a principled basis for allocating punishment.

¹⁸⁴ See Rawls op cit note 48 at 6; see also Quinton op cit note 123 at 140-141.

¹⁸⁵ Rawls op cit note 48 at 6.

¹⁸⁶ Bagaric op cit note 121 at 48.

¹⁸⁷ Hart (1959) op cit note 3 at 9.

¹⁸⁸ Berman (2008) op cit note 1 at 259.

¹⁸⁹ Ibid.

2.7 Towards a Principled Basis for Distributing Punishments

In sentencing, judges choose between multiple penal goals that often conflict.¹⁹⁰ The difficulty of deciding what goal should influence the choice of sentence led to the search for a guiding principle or primary rationale.¹⁹¹ Useful efforts in this direction emerged in the 1970s, on the heels of two important developments in penal theory. First, rehabilitation became burdened with its excesses, resulting in its rejection and a revival of interest in tough-on-crime measures. The second development is linked to the first; it caused a resort to retributive principles. This caused a heightened level of penal severity that inspired a new movement towards moderations in punishment. It was this movement that began to articulate a mixed or modified theory of deserts, as a more principled approach to punishment. By the 1980s, its ideas had become ‘the most influential penal theory’.¹⁹²

Its premise was simple and consistent with the hybrid model. Offenders may only be punished to the extent that their crimes deserve. Furthermore, unnecessary suffering is unreasonable and should be avoided because it lacks utility.¹⁹³ This noticeable bent towards moderation reveals two important features, namely commensurability (proportionality) and parsimony.¹⁹⁴ The new theory contrasted with theories that propose the distribution of punishment on the basis of elements that predict future offending, or of the potential for rehabilitation.¹⁹⁵ However, it should be emphasised that the theory’s appeal lay in the responses it offered to four interrelated needs. The first was for a distributive principle for allocating punishment, which would guide sentencers in choosing between conflicting goals of punishment.

¹⁹⁰ See Robinson (1988) op cit note 70 at 20. An example of the conflict the author noted is contained in penal codes, which, in order to favour deterrence, increase the threatened punishment when the inclination to offend is greater, while at the same time allowing an excuse, such as provocation, which diminishes responsibility. The offender is then said to have diminished blameworthiness, and liable only to a lighter sentence. The deterrent threat of punishment is said to decrease in such situations.

¹⁹¹ Andrew Ashworth ‘Structuring sentencing discretion’ in Andrew von Hirsch & Andrew Ashworth *Principled Sentencing: Readings and Theory in Practice* 2 ed (1998) 212-219 at 214. The search was underscored by the disparate sentences that judges frequently imposed when they and guideline drafters freely chose ‘whatever purpose justifies the desired sentence’. See Robinson (1988) op cit note 70 at 20-21.

¹⁹² Hudson (1996) op cit note 2 at 39; see also discussion in chapter 3 section 2.5.1.

¹⁹³ Hudson (1996) op cit note 2 at 58.

¹⁹⁴ See Von Hirsch (2003) op cit note 23 at 283; Morris (1974) op cit note 23 at 1162.

¹⁹⁵ Von Hirsch (1988) op cit note 9 at 168; Von Hirsch (1992) op cit note 72 at 68.

The second dwelt on how to rank punishment in order of severity, while the third mulled the need for equal treatment for like-situated offenders. Lastly, the theory offered a paradigm for choosing between penal sanctions. These responses are relevant to imagining a principled basis for punishment in Nigeria and are discussed below.

2.7.1 Resolving Conflicting Goals through the Aid of a Guiding Principle

Conflicting sentencing purposes occur because each purpose requires the consideration of different factors, each of which may demand different sentences. A guiding principle was therefore considered necessary to help sentencers choose between sentencing purposes in individual cases¹⁹⁶ and settle hard practical questions. These questions include: i) the degree to which sentences should be influenced by retribution, deterrence, rehabilitation or incapacitation; ii) whether sentences should be determined or limited by any one goal or combination of goals; and iii) how conflicts between the goals should be reconciled. On the practical level, the questions also turn on when imprisonment is an appropriate sanction and when other penal alternatives ought to be applied.

From the judicial perspective, conflicting goals explore tensions in a triad of interests that converge in punishment. The victim has a right of redress against the offender. The public also sustains a vested interest in seeing that right redressed, both for the victim's sake and for the broader object of preserving and restoring respect for the law, and of preventing future crime by punishing the offender.¹⁹⁷ Lastly, the offender also has a right to proportionate punishment and to opportunities for rehabilitation and reintegration into society.¹⁹⁸ These interests or the penal purposes they inspire are not necessarily harmonious and resolving them is of utmost practical consequence in sentencing. The sentencer's responsibility therefore is to find a balance that reflects judicious consideration of each purpose before a sentence is selected.¹⁹⁹ However, seeking a balance does not necessarily entail according equal weight to each purpose of punishment. If that were possible, there probably would be no conflicts to reconcile.

¹⁹⁶ See Robinson (1988) op cit note 70 at 19-28.

¹⁹⁷ On redress, see debate in chapter 2 section 4.2. See also chapter 4 section 3.4.2.

¹⁹⁸ See discussion in chapter 4 section 3.4 below.

¹⁹⁹ *Onyilokwu* supra note 40.

Sentencers seek a balance by weighing sentencing purposes and/or interests against each other. In the cases of *S v Rabie*²⁰⁰ and *S v Makwanyane*,²⁰¹ balancing interests was held to be a very important part of sentencing.²⁰² However, sentencing decisions have not always yielded a principled, step-by-step method for resolving the conflict,²⁰³ or for measuring penal severity. Different solutions have therefore been proffered in this regard, ranging from single-purpose distributive principles to hybrid distributive principles.²⁰⁴ In a single-purpose distributive model, deterrence, rehabilitation, incapacitation or retribution may be adopted as the sole purpose to be sought in any individual instance of punishment. However, the discussion on traditional theories has shown that no single purpose can provide a satisfactory account of punishment. A hybrid distributive principle on the other hand allows for a combination of purposes and potentially offers a guiding principle for resolving purposes when they are conflicted.

An example of a hybrid guiding principle was offered by Robinson,²⁰⁵ who proposed that deserts should be the basis for determining the amount of punishment, while utilitarian considerations determine the method of inflicting it. This hybrid brings retributive and utilitarian considerations into a relationship in which deserts functions as a determining principle, while utilitarian considerations operate as a limiting principle. Thus, the quantum of punishment is selected according to deserts, subject to limitations imposed by utilitarian considerations.²⁰⁶ Where, for example, the elements of a crime suggest a certain level of sentence severity, the individual circumstances of the offender may suggest that a community service or probation order, rather than a prison sentence, is the more appropriate punishment. The deserts requirement in such sentence is fulfilled by adjusting the length of time the offender is required to undergo community service or probation, so as to reflect the seriousness of his or her crime.²⁰⁷

²⁰⁰ 1975 (4) SA 855.

²⁰¹ 1995 (3) SA 391 (CC).

²⁰² See chapter 4 section 3.4 below.

²⁰³ Andrew Von Hirsch 'Doing Justice: The principle of commensurate deserts' in Hyman Gross & Andrew Von Hirsch (eds) *Sentencing* (1981) 243-256 at 247.

²⁰⁴ See Hudson (1996) op cit note 2 at 58-63.

²⁰⁵ Robinson (1988) op cit note 70 at 34-36.

²⁰⁶ Ibid at 37-39.

²⁰⁷ Ibid at 34-35.

Robinson crafted a ‘limiting criteria’ for his distributive principle; deserts would always enjoy priority, as long as it did not result in such intolerable crime levels that could have been averted by applying a utilitarian method.²⁰⁸ In other words, a deserts-based sentence ought not to be asserted when this would defeat the goal of deterrence. On the flip side, the preferred utilitarian method ought not to result in punishment that is ‘intolerably unjust’.²⁰⁹ Where this is a probable consequence, resort must be had to deserts as a ‘second limiting principle’.²¹⁰ The challenge with Robinson’s principle, however, is that it suggests a rather fluid standard for adjusting sentences. When, in the Nigerian context for example, would a death sentence be considered intolerably unjust?²¹¹ This question portrays the difficulty of attempting to satisfy utilitarian and retributive requirements in individual cases of punishment.²¹²

2.7.2 A Primary Rationale as an Alternative Approach to Resolving Conflicting Purposes

A primary rationale allows for an overriding purpose or principal aim of punishment, but it may allow the application of that principle to be moderated by the claims of another rationale. It may also allow a compromise when the primary rationale proves to be untenable.²¹³ But why is a primary rationale necessary? The significance of the question is amplified by the often disparate outcomes of discretionary sentencing in Nigeria. An overriding aim of the criminal law is to promote respect for the law, which it does by prohibiting and threatening punishment for rule breaking. Punishment communicates society’s censure for such actions, but it may well fulfil other legitimate purposes, such as deterrence, or rehabilitation. Sentencing policy ought to promote these purposes. However, promoting them together, in equal order of importance, can be confusing and unproductive. As Ashworth rightly observed, ‘[u]nless decisions of principle are taken on priorities and spheres of application of two or more sentencing aims, the resultant

²⁰⁸ Ibid at 38.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid. Not surprisingly, Robinson acknowledged that defining intolerable crime levels and intolerable injustice is a task with magnitude.

²¹² Hudson (1996) op cit note 2 at 59-60. Hudson criticises Robinson’s theory by pointing out that adopting a utilitarian method in order to deter or incapacitate an offender may yet conflict with proportionality. Conversely, where sentence is based on deserts, its anticipated deterrent value may be diminished.

²¹³ Ibid at 67.

uncertainty would be a recipe for disparity'.²¹⁴ Thus, the main goals of a primary rationale is to introduce certainty to sentencing and spare sentencers the burdensome task of deciding what principle should receive priority in any given case.²¹⁵

A penal system may adopt one or a combination of the purposes of punishment as primary rationale. In South Africa for example, the dominant rationale is deterrence.²¹⁶ In Nigeria, punishments are generally punitive, but sentencing policy is generally presumed to be retributive and deterrent.²¹⁷ In England and Wales, it is a mix. Section 142 of the Criminal Justice Act 2003²¹⁸ obligates courts to regard retribution, crime reduction (including reduction through deterrence), reform and rehabilitation, public protection and reparation when sentencing. The English Court of Appeal has followed these principles 'in a promiscuously eclectic mixture'.²¹⁹ Government policies have been similarly eclectic.²²⁰ However, the sentencing guidelines developed by the Sentencing Council of England and Wales, which the courts follow, point to a deserts-based scheme.²²¹ For the reasons offered below, this thesis prefers the deserts-based approach.

2.7.2.1 *Deserts as a Primary Rationale*

In traditional retributivism, deserts was criticised for offering an imprecise formula for measuring severity. In a modified deserts theory however, deserts is retained as the primary sentencing rationale, subject to modest deviations for utilitarian purposes.²²² The uniqueness and strength of the rationale lies in its emphasis on proportionate punishment and its exclusion of

²¹⁴ Ashworth (1998) op cit note 191 at 214.

²¹⁵ Ibid.

²¹⁶ In *S v J* 1989 (1) SA 669 (A) the court held, '[g]enerally speaking, however, retribution has tended to yield ground to the aspects of correction and prevention, and it is deterrence (including prevention) which has been described as the "essential", "all important", "paramount" and "universally admitted" object of punishment'. However, a Draft Sentencing Framework Bill that was prepared by the South African Law Reform Commission proposes retribution as the primary rationale. See SS Terblanche 'Sentencing guidelines for South Africa: Lessons from elsewhere' (2003) Vol. 120 Issue 4 *The South African Law Journal* 858-882 at 895.

²¹⁷ See discussion in chapter 3 section 4.3 below.

²¹⁸ See discussion on the Act in chapter 6 section 2.3 below.

²¹⁹ Cavadino & Dignan op cit note 11 at 55.

²²⁰ Ibid.

²²¹ See chapter 6 section 1.3 below.

²²² Andrew Von Hirsch 'Recent trends in American criminal sentencing theory' (1983) Vol. 42 Issue 1 *Maryland Law Review* 6-42 at 30.

considerations regarding future criminality from being decisive in defining the nature and measure of punishment. In Von Hirsch's²²³ words:

[T]he sentencer, instead of having to address elusive empirical questions of the crime-preventative effect of the sentence, can address matters more within his or her ken, concerning the seriousness of the criminal offence – how harmful the conduct typically is, how culpable the offender was in committing it.

The modified deserts theory maintains belief in the capacity of deserts to give better guidance in selecting punishment. It perpetuates some elements of retributivist thinking. For example, it maintains that punishment has a communicative value; it expresses censure and censure affirms the importance of the infringed right and treats the offender as a moral agent by appealing to his sense of right and wrong. These are functions that cannot be adapted to preventative crime policies, since no purpose would be served, for example, by punishing repentant offenders. For the victim, however, punishment communicates an important acknowledgement of the wrong he or she has suffered.²²⁴

As a primary rationale, deserts also avoids objections to the retributivist concept of equivalence. Its insistence on allocating punishment according to the seriousness of the offence does not necessarily support the proposition that punishment must produce suffering that is equivalent to the damage caused by the crime. Rather, the gist of punishment lies in the blame that it communicates. In this respect, the element of hard treatment that accompanies censure only provides a prudential reason for compliance. Thus, hard treatment functions as a supplement; it may be regarded as fulfilling a preventative role (to keep criminal behaviour within tolerable levels), without necessarily replacing the normative reasons for refraining from crime, which censure communicates.²²⁵ The supplemental value of hard treatment injects moderation into sentencing. Von Hirsch²²⁶ explained why this should be the case. 'The harsher the penalty is,' he argued 'the less plausible it becomes to see it as embodying chiefly a moral

²²³ Von Hirsch (1988) op cit note 9.

²²⁴ Ibid at 168-169.

²²⁵ Von Hirsch (1993) op cit note 10 at 13, see generally pp 9-13.

²²⁶ Von Hirsch (1988) op cit note 9 at 170-171. Von Hirsch placed considerable weight on the moral significance of censure. He argued that the criminal law is mainly concerned with preventing wrongful conduct, and that to 'carry out the authoritative response to such behaviour ..., it should do so in a manner that testifies to the recognition that the conduct is wrong. To respond in a morally neutral fashion is objectionable, not merely because it might lead to more crime in the long run, but because it fails to provide that recognition'. See also Von Hirsch (1992) op cit note 72 at 69-74, see particularly 72-73.

appeal instead of a system of bare threats'. The measure of severity fulfils a function though; it signifies the degree of censure accompanying the conduct.²²⁷

2.7.2.2 *Two Constructs of Deserts as a Primary Rationale*

How then does deserts operate as a primary rationale? Its main advantage is that it gives proportionality the key role in deciding punishment, without foreclosing ulterior purposes from refining the sentence.²²⁸ Different approaches to the proportionality principle in deserts-based sentencing have been adopted. One of these, proposed by Morris,²²⁹ is called 'limiting retributivism'. It requires establishing upper and lower limits of penal severity, so that punishments imposed outside the outer bands are considered undeserved. Morris reserved a limiting role for deserts in this approach, making sentence severity determinable on the basis of deservedness. However, within those limits, utilitarian considerations, such as the need to prevent reoffending or protect society, may operate as defining principles, allowing the adoption of a particular type of sanction that is equal in penal value to the deserts-based sanction. In this manner, parsimony is brought to bear on deserts. The problem with this approach however, is that it forfeits penal parity for the sake of parsimony. By allowing the actual sanction to be determined by utilitarian motives, it creates a propensity for disparate sentences for like-situated offenders. Thus, offenders may be subjected to different levels of censure (depending on the utilitarian end that is sought to be achieved) even when their actions are equally reprehensible.²³⁰

²²⁷ Von Hirsch (1992) op cit note 226 at 69-70.

²²⁸ Von Hirsch (1988) op cit note 9 at 172.

²²⁹ Morris op cit note 23 at 1173-1175; see also Norval Morris 'Desert as a limiting principle' in Von Hirsch, Andrew and Ashworth, Andrew (eds) *Principled Sentencing: Readings in Theory and Policy* 2 ed (1998) 180. See further Hudson op cit note 2 at 59. Hudson offers illustrations of how the theory works. A sentence that requires an offender to undergo probation may have equal penal value with a sentence to do community service, and either will be 'suitable for offences that are not so serious that only a prison sentence will be adequate'. Hence, a community service order will be adequate if the motivation for the offence was 'greed or sheer disregard for society'. A probation order will be appropriate if the offence was committed due to 'problems associated with personal difficulties'.

²³⁰ Von Hirsch (1988) op cit note 9 at 172-173; Von Hirsch (1981) op cit note 203 at 246-247; Andrew Von Hirsch 'Equality, "Anisonomy," and justice: A review of "madness and the criminal law" by Norval Morris' (1984) Vol. 82 No. 4 *Michigan Law Review* 1093-1112 at 1105-1107.

Von Hirsch²³¹ adopted a different approach. He articulated a scale for ranking punishments based on two distinguishable values, namely cardinal and ordinal proportionality. Simply stated, ordinal proportionality requires comparable levels of penal severity for offences with comparable levels of seriousness;²³² persons who have been convicted of crimes of relative seriousness should be sentenced to punishments of relative severity. Likewise, persons convicted of crimes that differ in seriousness should receive ‘punishments correspondingly graded in their onerousness’.²³³ In essence, ordinal proportionality reinforces the principle of equality in punishment, the requirement that like-situated offenders be treated alike and that unusually serious crimes be treated with punishments that are ‘correspondingly ranked in severity’.²³⁴ Using the principle, a penalty scale may then be organised to rank different crimes according to their relative seriousness and allocate punishments that correspond to those crimes in order of severity.

How then should relative sentence severity be established? Von Hirsch²³⁵ suggested starting with the known and then comparing seriousness between crimes. Where for instance, the punishment for offences A, B and C are known, the punishment for offence ‘X’ can be determined by comparing its seriousness with the seriousness of A, B and C. But then, how is sentencing severity for offences A, B and C determined? This question presupposes the need for a starting point for punishments. Von Hirsch’s censure theory proposes a solution:

The amount of disapproval conveyed through penal sanctions is a convention. When a penalty scale has been devised to reflect the comparative gravity of crimes, altering the scale’s overall punishment levels by pro rata increases or decreases in all penalties would represent a change in that convention.²³⁶

Generally, convention defines the limits of tolerable punishment. For example, to determine what levels of penal severity should attach to domestic burglary, England’s Sentencing Advisory Panel (SAP) conducted a survey of the levels of seriousness that the public

²³¹ Von Hirsch (1992) op cit note 72 at 77.

²³² Tyrone Kirchengast ‘Proportionality in sentencing and restorative justice paradigm: ‘Just deserts for victims and defendants alike?’ (2010) 4 *Crim Law and Philos* 197-213 at 204.

²³³ Von Hirsch (1992) op cit at note 72 at 76; Jesper Ryberg *The ethics of proportionate punishment: a critical investigation* (2010) 191.

²³⁴ Tapio Lappi-Seppala ‘Sentencing and punishment in Finland: The decline of the repressive ideal’ in Michael Tonry & Richard S Frase (eds) *Sentencing and Sanctions in Western Countries* (2001) 92-150 at 139.

²³⁵ Von Hirsch (1992) op cit note 72 at 77.

²³⁶ Ibid.

attached to different kinds of burglary.²³⁷ However not all conventions may be agreeable and some limits on penal severity are necessary. Such limits are instated by pegging or anchoring overall penalty levels in a penal scale (or sentencing range) at some predetermined levels, above or below which sentences may not be imposed. This pegging function is fulfilled by cardinal proportionality and is essentially ‘non-relative’.²³⁸ Cardinal proportionality anchors the scale’s overall dimensions or outer limits, setting the stage for ‘the more restrictive requirements of ordinal proportionality [to] apply’.²³⁹ Ordinal proportionality is achieved when there is relativity (i.e. correspondence) between the gravity of the offence and the severity of the punishment therefor, and, depending on how the penal scale is anchored, between punishments for different crimes.²⁴⁰ This portrays proportionality as a mechanism for maintaining sentencing parity between crimes of relative seriousness. Parity is sacrificed when this relationship of relativity is overlooked.²⁴¹

It should be noted however that the above discussion does not presuppose a scheme of penalties that furnishes specific, deserved punishments for any one crime or the other.²⁴² What cardinal and ordinal values do is to provide starting points on a penal scale and a method for moderating and achieving relative severity between crimes of corresponding seriousness. Starting points are rooted in conventions of censure that convey a society’s levels of tolerance for suffering. Since punishment, as Von Hirsch²⁴³ observed, is only one type of suffering that can be experienced in a community, its value as a penal intervention must be appraised by comparison with other types of suffering. Punishment qualifies as severe when it is regarded as very painful by such appraisal.²⁴⁴

²³⁷ See chapter 6 sections 2.3.

²³⁸ Von Hirsch (1992) op cit note 72 at 77; Michael Tonry ‘Proportionality, parsimony and interchangeability of punishments’ in Michael Tonry (ed) *Why Punish? How Much? A Reader on Punishment* (2011) 217-237 at 222-223.

²³⁹ Von Hirsch (1988) op cit note 9 at 174; Tonry (2011) op cit.

²⁴⁰ Von Hirsch (1992) op cit note 72 at 78.

²⁴¹ Von Hirsch (1988) op cit note 9 at 172 but see generally 174-178.

²⁴² Ibid; Von Hirsch (1992) op cit.

²⁴³ Von Hirsch (1981) op cit note 203 at 252.

²⁴⁴ Ibid.

Of course, this does not furnish an accurate measure and some conventions regarding penal severity will be unacceptable.²⁴⁵ In Gross'²⁴⁶ critical view, determining penal severity on the basis of 'considered judgments in the community ... leaves the matter unacceptably obscure'. Accordingly, Gross²⁴⁷ proposed fair market value as a model for determining proportionality. Fair market value is the amount that a buyer and seller voluntarily determine as the purchase price of an item. It is arrived at through rational judgments regarding factors that define the market value of goods and services. Although these judgements are based on the presumed 'normal dispositions and attitudes'²⁴⁸ of those who constitute the market, they nevertheless yield logically objective standards, so much so that even when changing dispositions modify valuations, they do not occasion mercurial shifts. The dispositions and attitudes remain 'sufficiently stable to allow for judgments of value that seem settled at any given time'.²⁴⁹ Gross found parallels between this model and proportionate sentencing. He considered proportionality to be an equally objective standard that depends on valuations that can be defended through careful judgment. Even when social dispositions (or conventions) change, they are not so drastic as to fundamentally revise underlying expectations about proportionality.²⁵⁰

Von Hirsch and Gross' views are apposite and are affirmed by the example of England's SAP mentioned earlier. To determine appropriate sentences for burglary, the SAP relied on empirical data that suggested people from 'widely different walks of life can make common sense judgments on the comparative gravity of offences and come to similar conclusions'.²⁵¹ Even though disagreements may arise, they tend to be about 'powerful intuitions or deeply embedded values'²⁵² on what sentencing principles should be decisive. However, of the various views that have been put forward to resolve these differences,²⁵³ Von Hirsch seems to offer a

²⁴⁵ Ibid.

²⁴⁶ Gross, Hyman 'Proportional punishment and justifiable sentences' in Gross, Hyman and Von Hirsch, Andrew *Sentencing* (1981) 272-283 at 273.

²⁴⁷ Ibid at 273-274.

²⁴⁸ Ibid at 274.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Von Hirsch (1981) op cit note 203 at 248.

²⁵² Tonry (2011) op cit note 238 at 233.

²⁵³ Examples include the approaches proffered by Morris and Gross. Yet another different approach construes proportionality as providing specific quanta of punishments. However, how proportionality yields the quanta is

more practical guide for determining proportionate sentences. To start with, his view that individuals have a roughly intuitive idea about disproportionate penalties warns that punishment ought not to be excessive or unduly lenient.²⁵⁴ This, potentially, offers a guide regarding how to anchor the outer limits of a penal scale. However roughly intuitive this appears, there is a sound commonsensical basis to suggest, for instance, that a sentence of imprisonment might be too severe for petty theft and a reprimand too lenient for causing public disorder. Within the structure of a scale however, measuring penal severity requires a more ratiocinated process, in which sentencing levels are ordered in terms of how crimes compare in seriousness.²⁵⁵

2.7.2.3 Underlying Principles in the Structure of a Penalty Scale

As may now be obvious from the foregoing discussion, a deserts-based penalty scale enshrines deserts as the primary rationale and uses ordinal proportionality to define the internal composition of the scale and to ensure that punishments correspond with the relative gravity of crimes. A critical feature in the internal composition broaches the need for spacing between severity levels. This ensures that penalties are not clustered in a manner that obscures differences in the seriousness of crimes. However, departures from ordinally determined sentences may be allowed on the basis of factors that aggravate or mitigate liability.²⁵⁶

The outer limits of the scale are determined by important cardinal principles. First, the limits should be guided by prevailing levels of tolerance for pain and should avoid punishing non-serious offences with greater severity than is deserved. Severe penalties should be reserved for serious crimes. Further, the overall sentence magnitude must not be so inflated as to make the punishment for non-serious crimes severe. Secondly, and with regards to the censure function of punishment, the penalty must bear a corresponding relationship with the seriousness of the offence. It must correspond to the degree of blame implicit in the crime and convey the message that the offender receives no more censure than he or she deserves. Accordingly, a lengthy prison sentence should indicate a greater degree of blameworthiness commensurate with the seriousness

uncertain. Taken literally, it would require a completely intuitive process to determine the deserved level of sentence severity for different crimes. See Von Hirsch (1992) *op cit* note 72 at 75-76.

²⁵⁴ Von Hirsch (1981) *op cit* note 203 at 252-253.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

of the crime. Conversely, a lenient sanction will communicate that the crime is less serious.²⁵⁷ However, sentences should not be unduly lenient, as that would devalue the interest that is sought to be protected by the proscription of a criminal act.²⁵⁸

If offense seriousness is a determinant of penal severity, determining seriousness becomes a crucial element. Seriousness consists of two variables, namely harm and culpability. Harm measures the degree of threatened or actual damage. The greater the harm or threat of harm, the graver the crime becomes. According to Von Hirsch²⁵⁹ measuring seriousness requires more than substantial inconvenience. Emphasis must be on the damage typically caused or risked by an offence of that kind. Culpability, on the other hand, defines the degree of blameworthiness for actual or threatened harm. It determines the extent to which a person may be held liable and punishable for his or her conduct. In other words, culpability determines whether a person should be punished at all, and how severely. It requires a consideration of elements that may excuse or mitigate liability, such as whether the crime was intentional, negligent, or reckless, as well as the roles played by the offender and the victim in the commission of the crime.²⁶⁰

On the whole, sentencing levels in a deserts-based penal scale are organised within the overall dimensions established by the principle of cardinal proportionality, such that sentences may not be imposed outside this overall dimensions. The cardinal principle ensures that punishments are kept within acceptable limits of tolerance for penal suffering and that crimes are not punished any more or any less severely than their perpetrators deserve.

2.7.2.4 *Benefits of the Deserts Model*

The first advantage of note is the unique advantage the model claims, of being the only principle that ensures that offenders are not punished beyond what they deserve. This, according to proponents of the model, places deserts as the only principle that meets the requirement of justice. It avoids excessively severe or disproportionately lenient sentences, in a way that

²⁵⁷ Ibid at 253-254.

²⁵⁸ Ibid at 247-248.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

utilitarian principles fail to, because they may require undeserved punishment when the anticipated benefits (of crime prevention for example) outweigh the costs (of incapacitating an offender).²⁶¹ Secondly, deserts avoids the onerous task of balancing conflicts between sentencing aims by giving deserts a dominant influence. Von Hirsch²⁶² conveys this advantage as providing a ‘workable starting point’ for allocating punishment that other theories do not. On the strength of these advantages, it can indeed be maintained that deserts satisfies the requirements of justice more than any other rationale. Even when some ancillary utilitarian motives are allowed to intervene, deserts ensures that an offender’s rights are not unfairly invaded because of some anticipated public benefit.

It remains to be seen how deserts as a primary rationale interacts with utilitarian principles. Essentially, both fulfil different roles; deserts responds to the requirement to do justice, while utilitarian principles function as crime prevention strategies, the pursuit of which must be constrained by deserts. While deserts enjoys pre-eminence in this relationship, the pre-eminence is not absolute. Special situations, such as aggravating or mitigating circumstances, may require adjusting the impact that deserts has on punishment.²⁶³ An example is when a court is called upon to take account of an offender’s criminal history when imposing punishment. Here, the utilitarian goal may be to incapacitate the repeat offender in order to protect the public from further crimes he or she may commit. In such cases, the justification for allowing criminal history to influence sentence severity lies in the predictive theory that an offender’s chances of re-offending increased with each offence he or she committed in the past.²⁶⁴ Associated with this theory is a presumption, which gives a first offender a benefit of the doubt that he or she may not have acted with criminal intent, or intended the criminal consequences of his or her action. This presumption diminishes with every subsequent offence, so that the degree of blameworthiness inclines upward as the criminal history increases. Blameworthiness becomes more certain with repeat offending and increasing penal severity on this account may be consistent with the

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Even though the predictive theory permits an evaluation of criminogenic factors (e.g. the offender’s socio-economic circumstances) that may enhance a prediction of reoffending, it has been asserted that deserts makes recourse to these factors unnecessary. See Von Hirsch (1981) *op cit* note 203 at 250-251.

deterrent theory that harsher punishments induce habitual offenders to desist from a life of crime. Even then, the deserts principle operates to regulate the upward incline, so that a subsequent offence does not become subjected to a harsher punishment unless the damage caused or risked by the previous offence was serious. Also, where the previous offence is unrelated to the present one, or occurred in the distant past, it may not be considered for the purpose of sentencing.²⁶⁵

The strongest appeal of the deserts model is the scheme it offers for ordering penal scales. However, the model is not perfect and difficulties may arise when penal parity is attempted across genres of crimes. Von Hirsch²⁶⁶ illustrates this difficulty by portraying bribery and theft as genres of crimes for which a relative penal value may be improbable. At the same time however, he points to a host of other crimes, including theft and burglary, which share enough commonalities that enable a valuation of their relative seriousness. Even for crimes that do not share such commonalities, deserts-based sentencing still offers a principled approach. At the least, it provides overall dimensions over and below which penalties may not be imposed. Within those limits, deserts and utilitarian considerations may be allowed to regulate one another in the manner suggested by Morris.²⁶⁷ Better still, another theory, called the rights based theory, may be utilised as a limiting principle.

2.7.2.5 *Criticism of the Deserts Model*

A foremost critic of Von Hirsch's model is Tonry,²⁶⁸ who objected to what he called the model's strong proportionality requirements. He described the requirement as grouping offenders and offences into standard and overgeneralised categories that do more injustice than they prevent. Apportioning similar punishment for like-situated offenders overlooks the fact that socio-economic conditions may differ significantly and these have markedly different criminogenic influences on offenders. Ignoring these subjective elements, as deserts does, attaches greater importance to objective legal measures, resulting in sentences that are unduly severe. Justice, Tonry argued, is hardly achieved through proportionality-based sentencing when socio-economic

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ See discussion in section 2.6.2c above.

²⁶⁸ Tonry (2011) op cit note 238 at 217, 225 & 232.

conditions are unequal.²⁶⁹ He also queried Von Hirsch's scheme for spacing penal severity, arguing that it offered no guidance regarding how many sentencing levels should be in a penal scale and whether differences in sentence severity should be the same throughout the scale, or different, and by what measure.²⁷⁰

Tonry offered two other noteworthy objections. One, applying Von Hirsch's model to intermediate sanctions could 'stifle their development, circumscribe their use and produce avoidable injustices'.²⁷¹ Intermediate sanctions comprise multipurpose penalties that are less severe than prison sentences, but more punitive than probation orders. Examples include boot camps, community service, day fines, electronic monitoring, house arrest, intensive probation and restitution, among others. Their value rests in the fact that they save costs and minimise prison use, while also meeting public safety needs.²⁷² Tonry²⁷³ argued that deserts' emphasis on penal parity circumscribed such sanctions.

Tonry's other objection is obviously hinged on a presumed conflict between proportionality and parsimony. He argued that proportionality and parsimony are focused on two different ends. While parsimony leans toward the least painful measure, proportionality objectifies equivalence in penal suffering,²⁷⁴ which makes resort to the least onerous measure difficult. The presumed conflict looms in intermediate sanctions, with the result that a sentencing scheme in which parsimony features prominently leans more to intermediate sanctions than a proportionality-based scheme would. To reconcile the conflict, Tonry²⁷⁵ proposed a middle ground of 'presumptive sentencing ranges', comprising upper (maximum sentences) and lower limits determined on the basis of proportionality. Within these outer limits, he proposed that 'judges should seek the least severe sentence that is consistent with the

²⁶⁹ Ibid at 217, 222, 225 and 230.

²⁷⁰ Ibid at 222-223.

²⁷¹ Ibid at 217.

²⁷² Tonry (1998) op cit note 24 at 202-203.

²⁷³ Ibid at 206.

²⁷⁴ The conflict is always under the surface in indeterminate sentences. See Tonry (2011) op cit note 238 at 220.

²⁷⁵ Ibid at 232-235.

governing purposes at sentencing'.²⁷⁶ This, in his view, would prevent disproportionately severe penalties.²⁷⁷

It does appear that the crux of Tonry's objections is the presumed inconsistency between deserts' inclination toward severity on one hand and parsimony's preference for the least drastic measure on the other. However, the model he proposed may not necessarily yield a better scheme for measuring severity. His 'presumptive sentence range' is in principle somewhat similar to the deserts model's starting points. It presupposes Von Hirsch and Gross' point that judgments about penal severity originate in conventions or social dispositions regarding penal suffering. Therefore, it would seem that the essence of Tonry's scheme lies in seeking a greater moderating role for parsimony. In his support for parsimony however, he alludes to a punitivism in deserts that is hardly consistent with modern accounts of the model. Proponents of the model, such as Von Hirsch and Ashworth,²⁷⁸ have rejected suggestions of a conflict between proportionality and parsimony, or of punitivism in deserts-based sentencing. They have argued that proponents of deserts have often championed moderations in penal severity. In their words, '[t]he basis of proportionality is not the return of penal suffering for suffering, but rather penal censure; and the latter conception allows substantial reductions in overall sentencing severity, so long as penalties express the requisite disapproval of criminal behaviour'.²⁷⁹ In support of their position, they point to several sentencing systems that have adopted deserts as a primary rationale and witnessed a reduction in the use of prison sentences as a consequence.²⁸⁰ This, doubtless, is an outcome that proponents of parsimony would support.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Von Hirsch & Ashworth (2005) op cit note 7 at 76-7; see also Von Hirsch (1988) op cit note 9 at 176-7.

²⁷⁹ Von Hirsch & Ashworth (2005) op cit note 7 at 76-77.

²⁸⁰ Ibid at 77-80. Some examples were cited. The Finish sentencing system makes offence seriousness the primary requirement, and 'stress[es] the neo-classical values of equality and proportionality'. The system aims at reducing overall severity, and has been considerably successful in reducing punishment levels. The Scandinavian sentencing system also emphasizes penal value (offence seriousness) and achieved light reduction in the use of prison sentences up until 1992. Subsequent penal legislation had the effect of toughening penalties for drunk-driving, but overall, sentencing practice in the country does not support the claim that deserts encourages to penal severity. In the United States of America, Minnesota and Washington utilise deserts-based proportionality, and experienced consequential reductions in the use of prisons. In England and Wales, the story has been more chequered, but none of the policies which supported deserts-based proportionality can be said to justify the claim that deserts results in punitiveness.

That said, could there be situations when proportionality yields to parsimony? Tonry argued for the outer bounds of a penal scale to be determined by proportionality, while parsimony guides judges in resolving issues about the quality and quantity of punishments in the scale. Tonry's allocation of functions is essentially a balancing scheme²⁸¹ that allows greater flexibility for sentencers. Deserts proponents would rather have a more structured ordinal scale for resolving questions about quality and quantity:

What the proportionality-principle provides then, is not simple answers but a common starting point and a common vocabulary. One begins by scaling punishments according to offence seriousness. Then, one confronts the issue over which legitimate disagreement may exist: what other values might trump proportionality, and warrant sentence inequalities? By taking this approach we have a workable way of grading penalties *pro tanto*. And we can focus on where we may disagree: departures from proportionality designed to meet other ends. Even those who diverge in theory, however, may agree that there are limits on how much those other ends can feasibly be implemented in a sentencing system.²⁸²

Adopting deserts as a primary principle offers a more practicable framework that is founded on two deserts values, namely deservedness and penal parity. The values represent deserts' strongest points and they are neither rigid nor ambitious. Importantly, these elements compel a systematic evaluation of 'the relative seriousness of offences (both when comparing one offence with another, and one instance of an offence compared with a different instance)',²⁸³ Sentences that are selected according to these deserts values may yet be modified by parsimonious considerations, while still preserving the underlying deserts principle. In other words, whatever the modifications may be, they should never fail to communicate the requisite level of censure. In the end therefore, it can be suggested that concerns about parsimony can be addressed in a deserts-based sentencing scheme.

However, there remains an issue of considerable difficulty for the deserts model – that of anchoring the cardinal magnitudes of a penal scale. Proponents suggest reliance on general

See also chapter 6 section 2.4d below for how parsimony was introduced to the structure of the English Sentencing Guideline for assault occasioning actual bodily harm.

²⁸¹ This is a probable effect of his allocation of proportionality and parsimony to distinct fields: proportionality establishes the outer bounds, while parsimony operates within that space that deserts proponents reserve for ordinal rankings of penalties. See Tonry (2011) *op cit* note 234 at 234-235.

²⁸² Andrew Von Hirsch & Andrew Ashworth 'Not Not Just Deserts: A Response to Braithwaite and Pettit Not Just Deserts: A Republican Theory of Criminal Justice by John Braithwaite; Phillip Pettit' (1992) Vol. 12 No. 1 *Oxford Journal of Legal Studies* 83-98 at 97.

²⁸³ Martin Wasik *Emmins on Sentencing* 2 ed (1985) 48.

tolerance levels for pain in a society, but this may yet be crude and unsatisfactory. Human societies differ on tolerance for human suffering. Although the maximum allowable sentence in Nigeria and the United States of America is the death penalty, Britain and South Africa have proscribed the penalty, though their approaches to the length of imprisonment differ. In Britain, a life sentence could mean imprisonment for life. In South Africa, an offender on life sentence will be eligible for parole after serving at least 25 years in prison.²⁸⁴ What then, beyond social attitudes about penal suffering, should influence how cardinal magnitudes are anchored? A probable answer could be found in injecting human rights a limiting principle in punishment.

2.8 Introducing Human Rights as a Limiting Value in Penal Severity

In section 2.3 above, it was suggested that human rights may only be curtailed if it can be morally justified. Criminal punishment provides a justifying reason. However, the section also noted that punishment ought to be inflicted within certain limits. The human rights theory claims the right to define the limits.²⁸⁵ According to the theory, even though offenders forfeit some of their rights when they break the law, they retain their humanity, which entitles them to a measure of rights. Consistent with the retributivist theory, the human rights theory accepts that punishment may only be inflicted on someone for a blameworthy act. However, once deservedness is established, the choice of punishment may be influenced by utilitarian concerns to prevent or reduce crime. Even so, these utilitarian concerns must be pursued within limits imposed by the rights of the offender.

The above suggests that the human rights theory proposes a distributive principle that combines retributive and utilitarian purposes. According to Cavadino and Dignan,²⁸⁶ the theory provides a measure that is roughly in proportion to the moral gravity of the offence, which also

²⁸⁴ By virtue of s 9(d)(v) of the Parole and Correctional Supervision Amendment Act 87 of 1997, a person on life sentence may only be placed on parole when he has served at least 25 years of the sentence, or when he has attained the age of 65 and has served at least 15 years of his prison sentence. Subsequently, s 73(6)(b)(iv) of the Correctional Services Act 111 of 1998 enacted similar provisions. It appears that the 25-year limit derives from a judicial tradition in which life sentences were not regarded literally, but prisoners were released after serving a period of time. Over time, a life sentence came to mean 25 years' imprisonment. See Jamil Ndamulira Mujuzi 'The changing face of life imprisonment in South Africa' (2008) *CSPRI Research Paper No 15*.

²⁸⁵ Cavadino & Dignan op cit note 11 at 55-56.

²⁸⁶ Ibid.

affirms an important principle of justice, to wit like cases should be treated alike. For the authors, proportionality is consistent with the human rights theory, because disproportionality ‘convey[s] incorrect messages about the relative gravity of offences’.²⁸⁷ While utilitarian ends may still be sought, these need not make punishments tougher in order to reform or incapacitate. Neither should fulfilling the requirements of proportionality preclude recourse to utilitarian principles.²⁸⁸ To satisfy both ends, Cavadino and Dignan adopt Morris’ concept of ‘limiting retributivism’ discussed earlier. Thus, even when the maximum proportionate sentence may be imposed, there ought to be no obligation to impose it ‘if other valid considerations indicate that a more lenient course will be more constructive or humane’.²⁸⁹ At this intersection between proportionality and utility, a strong element of parsimony operates in the rights-based scheme to ensure that no more freedom than is necessary is circumscribed in order to achieve crime reduction. It also ensures that prison sentences are used sparingly, reserving them for dangerous offenders who present a real threat to others. For offenders who repeatedly fail to comply with the terms of their non-custodial sentences, brief periods of incarceration should be utilised.²⁹⁰

In sum, the human rights theory suggests its own limits on penal severity, whether for utilitarian or retributive motives. How the theory may influence a penal scale may be summarized as follows. Human rights considerations determine the limits of cardinal severity. These limits may differ between societies. Nevertheless, a human rights principle, such as the prohibition against inhumane and degrading punishment, may be utilised to set the cardinal limit, which would not only be interpreted in a manner that is consistent with that society’s views about humaneness, but also developed incrementally as international human rights jurisprudence regarding punishment and human dignity evolve. Thus, a society may reject certain forms or levels of punishment because it is no longer consistent with contemporary understandings regarding human dignity, or with the prohibitions against inhumane and degrading

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid; Cavadino and Dignan quote Morris – ‘deserved justice and a discriminating clemency are not irreconcilable’ - to drive their point home.

²⁹⁰ Ibid at 57.

punishments.²⁹¹ Next, the approach can also be deployed to regulate sentencing severity within ordinal scales by setting the limits to whatever utilitarian aims may be sought and by ensuring that those aims do not undo the important requirements of fairness and justice. This would affirm deserts even when a sanction has been adjusted to fulfil some utilitarian objective. An ordinal scale that is properly set to communicate these values ‘infuses the real content to the question of what are the offender’s due deserts’.²⁹²

The above structure suggests that there are no apparent conflicts between the rights-based approach and the deserts model that cannot be reconciled. Indeed, the rights-based approach assumes the deserts premise when it recommends that maximum tariffs need not be imposed if there are valid utilitarian reasons to adopt a more lenient, constructive and humane penalty. This portrays human rights as operating as a limiting principle that restrains severity without necessarily diminishing deserts.²⁹³

2.9 Taking the Human Rights Theory Further to Instate Constitutional Moderations for Punishment

The human rights theory offers a paradigm that can be deployed to strengthen constitutional safeguards for punishment and define the parameters of a national sentencing policy. In most Constitutions, there are provisions that establish fundamental principles of justice and fairness, together with the important human right requirement that sentences ought to be proportionate to the offence. Punishments that do not meet these requirements are *prima facie* unconstitutional, because they violate rights and constitutional constraints on the power to punish. Accordingly, a sentencing scheme that integrates constitutional rights and values places proportionality at the core of respecting rights.²⁹⁴ While proportionality may not be expressly stated in Constitutions, the principle has been judicially affirmed as integral to determining whether punishment violates

²⁹¹ Ruth Kannai ‘Preserving proportionality in sentencing: Constitutional or criminal issue’ (2004) Paper submitted to the 18th International Conference of the International Society for the Reform of Criminal Law held at Montreal, Canada from August 8-14, at 12, available from <http://www.isrcl.org/Papers/2004/Kannai.pdf>, accessed 18 June 2014.

²⁹² Ibid at 10.

²⁹³ See Hudson (1996) op cit note 2 at 27.

²⁹⁴ See Kannai op cit note 291 at 13-20.

constitutional prohibitions against cruel, inhuman or degrading punishments. It has also been rightly argued that these provisions not only prohibit punishments that are manifestly cruel or degrading, they also prohibit punishments that are excessive or grossly disproportionate to the gravity of the crime.²⁹⁵

There are important observations to draw from the foregoing. To overcome the objection that punishment is a violation of a constitutionally protected right, it must be shown that the curtailment or limitation of the right is reasonable and justifiable in a democratic society. The limitation must demonstrate a ‘rational connection between the means and the ends’²⁹⁶ to avoid being branded as a violation. Under the South African Constitution, for instance, s 36(1) states:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature of the extent of limitation;
- (d) The relationship between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose.

This provision provides the standard that penal and other statutory limitations on human rights must comply with in South Africa. In *S v Makwanyane*,²⁹⁷ the Constitutional Court of South Africa applied the criteria in s 33(1) of the Interim Constitution, which were *in pari materia* with s 36(1) of the 1996 Constitution, to determine whether s 277(a) of the Criminal Procedure Act,²⁹⁸ which prescribed the death penalty for murder, was a constitutionally valid limitation on the right to life. The court found that it was not because the right was a fundamental right upon which the enjoyment of other rights depended, and that the death sentence terminated these rights abruptly and irretrievably. Furthermore, the court found that the sentence had a history of being imposed arbitrarily and that it does not serve any penal purpose that could not be

²⁹⁵ *S v Makwanyane* supra note 15; see *Solem v. Helm* 463 U.S. 277 (1983); *R v Lyon* [1987] 2 S.C.R. 390; The Eighth Amendment to the Constitution of the United States of America prohibits excessive bail and fines, and cruel and unusual punishments. Section 12 of the Canadian Charter of Rights and Freedoms does the same. Article 2 of the European Convention on Human Rights prohibits torture, inhuman or degrading punishment while the African Charter on Human and People’s Rights (article 6) prohibits ‘... cruel, inhuman or degrading punishment and treatment. See Kannai op cit note 291 at 16-20, 25-30 & 32-35.

²⁹⁶ Kannai op cit note 291 at 20-11.

²⁹⁷ Supra note 15.

²⁹⁸ Act No 51 of 1977.

satisfied by the less drastic measure of long term imprisonment. The court applied a similar analysis in *S v Williams and Another*.²⁹⁹ In both decisions, elements of proportionality and parsimony were noticeably at work in the court's findings that there ought to be a reasonable connection between the method of punishment applied and the purpose it is intended to achieve, and that a rights limitation must employ the least invasive measure.

The benefit of instilling punishment with a constitutional principle is that it imposes restraints on penal severity. It does seem however, that a constitutional principle does better at establishing cardinal limits. This is obvious from the requirement that the sentence must deviate significantly from the deserved punishment before it can be said to be disproportionate and in violation of the Constitution.³⁰⁰ This suggests that only grossly disproportionate sentences may violate the Constitution. This standard may give rise to unsatisfactory outcomes, such as is the case in the United States of America where offenders can be sentenced to life imprisonment because they had a history of property crimes, without regard to the gravity of their crimes.³⁰¹ Besides, it is difficult to find agreement in judicial pronouncements regarding when sentences may be regarded as grossly disproportionate.³⁰² Thus, beyond defining the outer boundaries of punishment, constitutional provisions alone may not be very helpful in establishing ordinal rankings.³⁰³ They must be supplemented by sentencing guidelines.³⁰⁴

²⁹⁹ 1995 (3) SA 632 (CC) at paras 58, 91-92.

³⁰⁰ In the case of *Solem v. Helm* supra, the United States Supreme Court held that the prohibition of cruel and unusual punishments in the Eighth Amendment also apply to punishments that were grossly disproportionate to the crime. Also, the Canadian Supreme Court held in *R v Lyon* supra that the protection guaranteed by s 12 of the Canadian Charter was violated where the punishment imposed was so excessive. Accordingly, it held that an indeterminate sentences would in some circumstances be grossly disproportionate.

³⁰¹ This happens under America's Three-Strikes Laws. See Sara Sun Beale 'The Story of Ewing: Three Strikes Laws and the Limits of the Eighth Amendment Proportionality Review' in Donna Coker & Robert Weisberg (eds) *Criminal Law Stories* (2013) Foundation Press, Available at: http://scholarship.law.duke.edu/faculty_scholarship/2330, accessed 20 November 2014.

³⁰² Kannai, op cit note 291 at 28-29; see also *Lockyer v Andrade* 123 S. Ct. 1166 (2003); *Ewing v. California* 123 S. Ct. 1179 (2003).

³⁰³ Kannai op cit note 291 at 4.

³⁰⁴ Ibid at 41.

2.10 Conclusion

This chapter sought to find a principled basis for sentencing in Nigeria, starting first with an attempt to demonstrate how inadequate attention to the subject in penal discourses in Nigeria create a critical knowledge gap, and suggesting that the gap impedes the development of a principled approach to sentencing in Nigeria. The consequences have been an inclination toward penal severity in Nigeria, lack of clarity regarding sentencing policy and apparently disparate sentences. To fill the gap, the chapter reviewed penal discourses that have influenced sentencing reforms in the West in the last few decades. This led to an examination of modern penal theories that chart a more principled approach to allocating punishment, with the object of understanding how this could help imagine a principled basis for sentencing in Nigeria.

Of the different modern theories examined, Von Hirsch's model offers the more suitable approach for achieving a principled basis for sentencing in Nigeria. This suggests the adoption of deserts as a primary rationale, based on its consistency with the basic principle of justice that punishment should be deserved. Adopting a primary rationale would avert the burden that Nigerian courts have acknowledged of having to determine in each case what proportion of the punishment should be allocated to each sentencing goal. The deserts model provides a scheme for ensuring penal parity and moderating severity. Such a scheme is vital for Nigeria because of persistent wide disparities in sentencing. It will enhance consistency between sentences and rein in punitive inclinations among penal policy makers, lawmakers and sentencers. It will ensure that the element of censure in punishment corresponds with the gravity of the crime.

However, a suitable model for Nigeria must also integrate a rights-based approach. This is particularly needful because of the serious human and constitutional rights abridgments that accompany punishment in Nigeria. At the moment, Nigeria's pluralistic penal system allows extremely severe punishments that may not pass muster in a democratic society that upholds constitutional rights.³⁰⁵ However, to ensure that human rights protections are firmly entrenched in punishments, cruel, inhuman or degrading punishments need to be unambiguously prohibited

³⁰⁵ Under the law criminal codes and other statutes, the death penalty is reserved from crimes ranging from murder to armed robbery and kidnapping. For almost every other crime, a sentence of imprisonment applies. Corporal punishment and imprisonment with hard labour is also prescribed in the codes. In states that have adopted sharia, punishments include amputation, caning, and death by stoning, among others.

by the Nigerian Constitution. The prohibition is a necessary step to finding a suitable conceptual basis for punishment in Nigeria.

Introducing human rights to Nigeria's sentencing policy will provide necessary safeguards for punishment. Beyond Nigeria, the rights-based approach has increasingly moderated penal severity. It has prompted different criminal jurisdictions to drop certain punishments from their laws, or to seek proportionality between crime and punishment. Although national responses to international human rights standards differ, the human rights theory has continued to grow in influence and has become a 'generally acceptable standard for evaluating the practices of criminal justice in different countries.'³⁰⁶ This may well be one of the most remarkable penal developments of the late twentieth century.³⁰⁷ Greater respect for human rights supplies the cap on penal severity in Britain and South Africa. As a result, the death penalty has been excluded from both countries, convicts can be eligible for parole systems, and there are alternatives to prison.³⁰⁸ How penal developments in Britain and South Africa evolved to this point is one of the subjects of the next chapter. Nigerian sentencers and penologists will do well to pay close attention to them.

³⁰⁶ Hudson 1996 op cit note 2 at 75.

³⁰⁷ Ibid.

³⁰⁸ See discussion in chapter 3 sections 3.6 and 3.2.2.

Chapter 3 Punishment in a Socio-Historical Context: Exploring Influences that Shape Penal Policy

Indeed, the story of the changes in social attitudes toward the offender is essentially the story of how the roles of the various means and motives of punishments have progressively lost or gained importance. And the story is inextricably interwoven in the history of cultural change in general; for the nature of punishments and the motives behind them, reflect the fundamental character of the structure, the institutions, and the intellectual life of society; as these change, so do the attitudes towards offenders, as well as the resultant ways of dealing with them.¹

3.1 **Introduction**

One of the points explored in chapter two was that punishment communicates a degree of censure that is consistent with underlying social attitudes that define tolerance for human suffering, or penal suffering in particular. How societies tolerate penal suffering differ. In Nigeria's pluralistic penal system, the differences are portrayed in the varied penalties that attach to the same crimes under the English common law based codes or sharia codes. This has resulted in parallel penal regimes that adopt different scales for measuring sentence severity. The scales offer insight into the different value systems of the cultures (peoples) that embrace the codes, and to the levels of penal suffering they can tolerate.² Chapter two also examined different theories about allocating punishment and concluded with the observation that a deserts-based theory rooted in a rights-based approach provides better guarantees against disproportionate severity in punishment.

This chapter explores how the sentencing systems in South Africa, England and Nigeria arrived at the different points they are today. It approaches the inquiry by looking at the socio-

¹ Thorsten Sellin 'Correction in historical perspective' (1958) Vol. 23 *Law and Contemporary Problems* 585 at 586.

² For example, adultery is a crime under Penal Code laws but not so under the Criminal Code. See ss 387 and 388 of the Penal Code Law, Chapter 105, Laws of Kano State, Nigeria. In states in northern Nigeria that practice sharia criminal law, adultery is punishable by death through stoning or with a hundred lashes depending on the defendant's marital status. See s 5 of The Niger State Penal Code (Amendment) Law 2000; Carina Tertsakian 'Nigeria "Political Shari'a"?': Human rights and Islamic law in northern Nigeria' (2004) Vol. 16 No. 9(A) *Human Rights Watch* at 13-16, 90-93 & 112.

cultural context in which each country formulates its approach to punishment. The context is important to this study, because punishment assumes different nuanced meanings, symbolisms, significances and usages that can be culture specific. It is therefore necessary to examine the contexts in which these nuances are formed.³ Accordingly, the chapter will attempt to illustrate how the ideas and practices that surround punishment today evolved - and were in fact debated - in a socio-historical context, as each society pondered questions about how to respond to crime and criminality and how to set limits to the State's power to punish. It will attempt to show that societies typically frame traditions of punishment in ideological moulds and that these moulds often change because of mutable (moral) values that underpin punishment.⁴

Generally, debates about punishment have been significantly influenced by the dominant culture in each age. Judges are necessarily a part of that culture. 'The judicial mandate to punish', argued Smith,⁵ 'is underpinned by cultural codes requiring practical solutions to the peculiarly cultural and moral problem of disorder'. There is a temptation to limit this function to applying principles that have been developed by criminologists and philosophers. However, in a way that is uniquely juridical, judges bear the responsibility of bringing their society's values to bear upon punishment. This uniquely judicial function, which involves resolving hard questions of life and liberty in real – not imagined – cases, deserves reckoning in the punishment discourse. That said, it must be conceded that what may be defined as crime and appropriate punishment are not questions of a strictly legal or judicial nature. They are questions that are first engaged in a social context, through the political process.

³ See Phillip Smith *Punishment and Culture* (2008) 1, & 6 -7.

⁴ Beccaria so well captured the socio-historical context of the changing values in punishment with the following statement; 'Anyone who reads the laws and histories of nations with a philosophical eye will see the changes that have always occurred over the centuries in the words *vice* and *virtue*, *good citizen* and *bad*, not as a result of changes in the country's circumstances and so in the common interest, but as a result of the passions and false beliefs which at various times have motivated the different lawgivers. The reader will see often enough that the passions of one century are the basis of the morals of later centuries, that strong emotions, the offspring of fanaticism and enthusiasm, are weakened and, so to speak, gnawed away by time, which returns all physical and moral phenomenon to equilibrium, and they become the common sense of the day and a powerful tool in the hands of the strong and astute. In this way, the very obscure notions of virtue and honour were born, and they are so obscure because they change with the passage of time which preserves words rather than things, and they change with the rivers and mountains which so often form the boundaries not only of physical but also of moral geography.' See Cesare Beccaria *On crimes and Punishment and Other Writings* (1995) 20-21.

⁵ Smith (2008) op cit note 3 at 13.

Human societies are distinctly peculiar, and it is trite to say that society, culture and ideology constantly evolve. When ideological shifts occur, they precipitate social changes that include shifts in thinking and practices surrounding crime and punishment. These changes unavoidably reflect the peculiarities of each society, its legal and political traditions, and the exigencies that shape and prioritize its crime problems and responses. Thus, political and cultural dynamics in crime and punishment reflect the diversities of individual national contexts.⁶ The dynamics also reflect how changes in penal thought and practice are driven by underlying economic relations and class structures that characterize society. As one author observed, ‘the ideas and practices of punishment are not only culturally and historically specific but are simultaneously embedded in the class and structures of particular societies ...’⁷

This chapter examines the above claims through different eras of Western civilization and through different phases of colonial influence in sub-Saharan Africa to date, using penal developments in Britain, Nigeria and South Africa as illustrations. Britain’s colonial foray in Nigeria and South Africa provides the common law heritage that connects all three countries. But there is another common thread. All three are constitutional democracies and have all instated constitutional protections for human rights. Nigeria and South Africa have inserted a Bill of Rights in their Constitutions.⁸ Britain’s Constitution on the other hand is uncoded and has been subject to continual development, some of which have been brought about by national legislation and international treaties. A particularly important constitutional development in this respect occurred when Britain adopted its Human Rights Act,⁹ which incorporated substantial parts of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 into domestic law.¹⁰

⁶ Richard Sparks ‘State punishment in advanced capitalist countries’, in Thomas G Blomberg & Stanley Cohen (eds) *Punishment and Social Control* (2003) 19-44 at 25; Sparks writes that ‘[t]he pressures that drive penal politics do not originate within the criminal justice system alone. Rather, they concern the very character of our political culture, of which our choices about punishment are among the most telling and consequential expression’.

⁷ Gail Super ‘Punishment and the body in the ‘old’ and ‘new’ South Africa: A story of punitivist humanity’ (2011) Vol. 15 *Theoretical Criminology* 427 at 429.

⁸ Chapter V of the Constitution of the Federal Republic of Nigeria, 1999, and Chapter 2 of the Constitution of the Republic of South Africa, 1996.

⁹ Chapter 42 of 1998.

¹⁰ See Elizabeth Wicks *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (2006) 1-3, 123-129 but see also 131-134. The adoption of the Convention did not create new rights in Britain. It only

It is not the aim of this chapter to launch into an exhaustive treatment of the history of penal developments in the three countries. Such an inquiry is outside the scope of this thesis. Neither is it the intention to periodise penal history into neat chronological compartments. The aim of the chapter is to sketch a broad outline of important moments in the penal histories of the countries for two reasons; first to illustrate cultural and political influences on penal policy and secondly, to spotlight constitutional developments that are changing penal policy in each country. In the context of Nigeria's penal history, it is of particular interest to see how penal developments in Britain impacted penal policy in Nigeria. Accordingly, the inquiry begins with Britain.

3.2 Crime and Punishment in Britain: From Medieval Society to the 17th Century

Medieval Britain was a feudal society; the modern State, its institutions of crime control and notions of crime and punishment – as used today – were unknown to that society.¹¹ Offences and the methods of dealing with them were defined by community norms, which regarded 'crime' as a violation of personal rights, or a personal wrong for which the victim retained the right of revenge. No distinctions were made between civil and criminal wrongs; neither were there public authorities to moderate the right of retaliation. As a consequence, punishments were markedly ferocious.¹² This ferocity persisted through later middle ages when the monarch began to assume control over punishments. For the most part, the preferred punishments were 'corporal or capital'.¹³ Although jails existed, they were used to detain offenders until they could be tried and punished. The feudalistic structure of the society brought social stratifications into

allowed the rights, to which Britain had already shown some commitments, to be secured in British courts, or to be secured in the European Court of Human Rights, if resort to British courts failed. See also Vernon Bogdanor *The New British Constitution* (2009) 59 & 63-64, see generally 54-64; David Feldman 'Civil Liberties' in Vernon Bogdanor (ed) *The British Constitution in the Twentieth Century* (2003) 401-481 at 464-467.

¹¹ John Lea *Crime and Modernity: Continuities in Left Realist Criminology* (2002) 25-27.

¹² Ibid at 27-30; see GR Elton 'Introduction: Crime and the Historian' in JS Cockburn (ed) *Crime in England 1550-1800* (1977) 1; Jim Sharpe 'Crime, order and historical change' in John Muncie & Eugene McLaughlin (eds) *The Problem of Crime*, 2 ed (2001) 107-150 at 110-111; HR Hahlo & Ellison Kahn *The South African Legal System and its Background* (1968) 472.

¹³ Seán McConville 'The Victorian prison: England, 1865-1965', in Norval Morris & David J Rothman (eds) *Oxford History of the Prison: The Practice of Punishment in Western Society* (1995) 131-167 at 132.

punishment; different punishments applied to the gentry and peasantry, as did the manner in which they were executed.¹⁴

From mid-seventeenth century, Britain began to experience historic developments. A powerful landowning ruling class emerged that took control of parliament and subsequently succeeded – after intense political struggles – at subjecting the monarch’s powers to parliamentary assent. A metamorphosis was also evident in Britain’s economy; its erstwhile agrarian rural economy began to give way to a market economy, creating with it new forms of property relations. New epicenters of human activity instigated rapid urbanisation. Alongside these developments, however, were new social problems; an impoverished urban underclass was rapidly being created, and seen by the ruling, property owning class as threats to property rights. To resolve this threat, the ruling class assumed responsibilities for (re)constructing crime and punishment, and reeled out laws that radically increased the number of offences for which capital punishment could be imposed. The laws mostly defined crime in terms of relations with property¹⁵ and were infamously dubbed the ‘Bloody Code’¹⁶ for their frequent resort to capital punishment even for petty crimes involving property.¹⁷ They embodied the brutality and symbolism that depicted punishment in the Middle Ages,¹⁸ as well as the class relations that would define crime and punishment in the British society of later ages.

3.2.1 The Enlightenment and Punishment in Eighteenth Century British Society

By the eighteenth century, the old feudal economy had become obliterated by rapid industrialization. Industrial and commercial activities fuelled urbanisation, affirmed the importance of property ownership and created new paradigms of social relations. Unprecedented levels of wealth circulated amongst a few. Urban poverty spiralled and with that came new social

¹⁴ Ibid at 132-133.

¹⁵ Lea (2002) op cit note 11 at 36-37.

¹⁶ See Sharpe op cit note 12 at 116-117; Joanna Innes & John Styles ‘The crime wave: Recent writing on criminal justice in eighteenth-century England’ (1986) Vol. 25 No. 4 *Journal of British Studies* 380-435 at 421; Clive Emsley *Crime and Society in England, 1750-1900* 3 ed (2005) 33.

¹⁷ Sharpe op cit note 12 at 129-130.

¹⁸ Ibid at 130-131; see also Michel Foucault *Discipline and Punish: The Birth of the Prison* (1995) 75. There were fewer actual crimes at this time, and a few of those convicted were executed. The retention of the laws, and selective executions were motivated by the need to protect property rights from perceived threats from the underclass.

tensions, including those that resulted from soaring crime and conviction rates.¹⁹ Crime continued to be defined in connection with property rights. The prisons also acquired new status as a penal alternative. Indeed, so frequent was the resort to incarceration that prisons became overcrowded and the conditions inhumane. The English justice system came under significant distress as a result of property-related crimes.²⁰

However, other positive forces of change were at work during this period. The Enlightenment had commenced and it was beginning to foster political awareness and new attitudes about crime and punishment. Up until this time, the Monarch and Church had overseen brutal punishments. The new intellectual and social culture of the age was set to change that, as it prompted demands for political reforms, democracy and the rule of law. These demands altered existing paradigms of social control, so that debates about crime and punishment began to be waged in the context of changing political realities, and around the need to adapt and refine the state's capacity to regulate public affairs, reinvent the machineries of social control and improve the capacity of the criminal justice system to respond to crime.²¹ These developments signalled monumental changes that would redefine social relations. Although change was slow in coming, there was no doubt that the Enlightenment had set it in motion.

3.2.2 Still on Eighteenth Century Penalty: Public Hangings and the Quest to Humanize Punishments

Industrialisation created significant dislocations in the social fabric and fostered class conflicts that emerged as traditional land relations (between landowners and the peasantry) gave way to modern forms of employment relations.²² Soon enough, '[c]rime became tied up with the social conflicts and antagonisms associated with these changes'.²³ With time, crime almost entirely

¹⁹ John Lea 'Crime and protest in eighteenth century England' (2006) available at <http://www.bunker8.pwp.blueyonder.co.uk/history/36803.htm>, accessed on 15 June 2013.

²⁰ Pieter Spierenburg 'The body and the state: early modern Europe' in Norval Morris and David J Rothman (eds) *The Oxford Prison of the Prison: The Practice of Punishment in Western society* (1995) 49-77 at 49-61.

²¹ See Lea (2002) op cit note 11 at 34-5; McConville (1995) op cit note 13 at 133; Randall McGowen 'The well-ordered prison, England, 1780-1865 in Norval Morris & David J Rothman (eds) *The Oxford History of the Prison: The Practice of Prison in Western Society* (1995) 79-109 at 92-97; Foucault op cit note 18 at 77.

²² Lea (2006) op cit note 19.

²³ Ibid.

assumed economic dimensions, shifting from its focus on the human body to a focus on fraud. The shift reflected how crime embraced new patterns of production and wealth creation, and the 'higher juridical and moral value placed on property relations'.²⁴

A consequence of the shift was that by the nineteenth century, crime became something only the criminally savvy could do. There were refinements in punishments as well, though it would take much longer for punishment to shed its brutality.²⁵ More pertinent, however, was the civilising effect that the Enlightenment was having on debates about crime and punishment, as was fittingly illustrated in Gatrell's²⁶ study of public hangings during the period. The study portrayed conflicts over whether to preserve public hangings, withdraw them from public view, or abolish the death penalty altogether. Instructively, the Bloody Code's prescription of public hangings for crimes like arson, burglary, forgery, coining, housebreaking, murder or attempted murder and theft amongst several other crimes, raised a spectre of extreme brutality that repulsed a few refined minds and prompted calls for reforms.

Among the voices that called for reforms was Samuel Romilly's, a member of the British Parliament and critique of distortions in Britain's criminal justice system. In Romilly's²⁷ view, the object of the criminal law was to deter crime by holding forth the deterrent of punishment. However, it is the certainty of punishment, rather than its severity, that deters offenders. The threat of punishment loses efficacy when the criminal law becomes a cure all for society's problems, and when violations are dealt with through disproportionate criminal sanctions. Thus, Romilly²⁸ protested the excessive criminalization of minor infringements to property rights and the use of capital punishments for petty offences like theft. Although several capital offences had fallen into disuse at this period, the State justified their retention in the statutes by presuming that they continued to fulfil a deterrent function. However, English sensibilities were changing considerably, so that judges and juries who found the penalties repulsive began to find ways to

²⁴ Foucault op cit note 18 at 75-77.

²⁵ Ibid at 75-76.

²⁶ VAC Gatrell *The Hanging Tree: Execution and the English People 1770-1868* (1994).

²⁷ Samuel Romilly *The Speeches of Sir Samuel Romilly in the House of Commons: In Two Volumes, vol. I* (1820) 38-39.

²⁸ Ibid at 40-43; see also Herbert A Johnson, Nancy Travis Wolfe & Mark Jones *History of Criminal Justice* 4 ed (2008) 147-148.

circumvent laws that prescribed them. Their continued retention was therefore counterproductive; it multiplied rather than prevented crimes,²⁹ and bespoke a standard of cruelty that justified ‘every harsh and excessive exercise of authority’.³⁰

Much as finer sensibilities were emerging in British society, effort to revoke capital offences achieved modest results.³¹ The French Revolution of 1789-1799 may have played a part in circumscribing reform efforts. The Revolution offered enough reasons for Britain’s wealth owning class to reject Romilly’s efforts to end decapitations for treason.³² In their minds, the Revolution reinforced the necessity of retaining a punishment that impressed the public with complete disgust for treason. Relying on a centuries-old tradition of support for decapitation, therefore, they argued that beheading was no more painful than hanging. Even if it was ‘in appearance theoretically severe, [it was] in reality practically human. ... the body was dead’³³ at any rate. ‘Parliament’s resistance to the abolition of the aggravated sentence (for treason) could [therefore] be construed as a reasoned response to social disorder. This was no time for gratuitous mitigations of the law. The lessons of the French revolution could not be denied.’³⁴

Nevertheless, there were reformers who embraced the Revolution,³⁵ and whose rejection of public hangings was deepened by the cruel injustices of the English system. They were particularly incensed by the execution of a certain Mary Jones – the poor mother of a suckling – for shoplifting, and by other instances of cruel injustice in which capital punishments were

²⁹ Romilly op cit note 27 at 41-44; see also K ‘Observations on the Criminal Law of England as it relates to capital punishment, and the mode in which it is administered by Samuel Romilly – a Review (May 31, 1880) Vol. 4 No 22 *Belfast Monthly Magazine* 353-364 at 354; Emsley op cit note 16 at 192, 202.

³⁰ Their retention revealed an official mind-set that was enamoured with the brutal imagery of punishment. See K op cit note 29 at 355, 361-2. Romilly argued that sustaining this rigid system defeated the aims of criminal justice. Executions for petty crime repulsed the public, invoked their sympathy, and repelled their support for the system. Romilly illustrated how the official mindset became heedless of emerging sensibilities. Complainants failed to show up at trials, while jurors dispensed with justice according to the inhibitions or permissions of their consciences. They returned ‘compassionate verdicts’ even if the facts were plain and a finding of guilt would have been legally justified. Members of the public also refrained from giving information when they knew that the information could result in a death sentence.

³¹ Some of these efforts were championed by Romilly. See Romilly op cit note 27 at 48-51; Gatrell op cit note 26 at 332; however, those that were repealed had been disused anyway, or were being circumvented by the enforcers.

³² Romilly op cit note 27 at 461-479.

³³ Gatrell op cit note 26 at 319.

³⁴ Ibid at 320.

³⁵ Ibid at 332.

exacted.³⁶ One of these reformers was Capel Lofft, who together with John Jebb, penned the following criticism of English criminal law in the eighteenth century:

[I]t would appear that the objects of commerce and trade, instead of being protected with a wise and temperate vigilance, have been nominally secured with a vindictive jealousy: the amusements of the great and wealth guarded as the very existence of society; and guarded with exclusive rigour.³⁷

This statement was directed against the deployment of the criminal law to protect the exploitative interests of Britain's wealthy class. Lofft³⁸ also condemned the high number of crimes that attracted excessive sanctions, which he claimed was the corollary of channelling the criminal law for the purposes of protecting revenue. Together with other liberal-minded reformers, he advocated respect for civil and political rights, the rule of law and law reform. Unfortunately, however, it would take a while longer for official attitudes to budge.³⁹

Although official attitudes remained fixated, social feelings continued to move away from brutal and disproportionate sentences, and may have been galvanised by the social trepidation that followed the public hangings of Sarah Lloyd and Eliza Fenning in 1800 and 1815 respectively. Sarah Loyd was pregnant when she was hanged for stealing items valued at forty shillings. Fenning received a similar sentence for allegedly poisoning the meal that she and her employer's family ate. Her pleas of innocence, the fact that she also fell ill from eating the same food and other circumstances that could have exculpated her were all ignored in an irrational haste to convict her for attempted murder. Both hangings stirred a sense of injustice and became the themes of widely disseminated discourses on the injustices of the English criminal justice system. The executions provided an outlet for growing frustrations with the system.⁴⁰ These,

³⁶ Ibid at 331-334, 360-70.

³⁷ John Jebb & Capel Lofft, *Thoughts on the Construction and Polity Of Prisons, With Hints for their Improvement* (1785) 34.

³⁸ Ibid.

³⁹ Gatrell op cit note 26 at 343-344 & 353.

⁴⁰ Ibid at 369. According to Gatrell, '[m]any other factors contributed to this outcome in the post-war years. With the country in turmoil, political trials numerous, the regent despised, radical satire constantly dripping, and traitors decapitated outside Newgate [the main convict prison], radical iconography ... was awash with virulent images of hanging judges and clerical magistrates. At the populist level, Paleyite rationalizations were not allowed to pass. Ellenborough was spat upon by the crowd when he left the court after Hone's triumphant acquittal in 1817. The fuss about Fenning was part of a louder anger in these years.' William Hone, an English writer who tried to save Eliza Fenning from execution published a book that shattered the case of the prosecution. His criticisms of state abuses earned him blasphemy trials, one of which was before Lord Ellenborough in 1817. Lord Ellenborough directed the jury to return a guilty verdict, but the jury acquitted Hone. Paleyite rationalizations refers to the ideals of William

together with other executions that further entrenched opposition to public hangings, instigated some changes; some capital crimes were revoked, while judicial executions were reserved for murderers. Public hangings also ceased. However, the callousness with which punishments were executed remained, courtesy of ‘old punitive voices’⁴¹ that would not go away. Rising crime rates ensured that these voices retained centre stage a while longer.⁴² Nonetheless, limited as the changes may be, new attitudes were crystallising; whereas punishments in the middle ages spared little thought for human suffering, the eighteenth century witnessed a ‘[g]rowing sensitivity to violence and an aversion to physical suffering [that had] an impact on ideas about appropriate forms of punishment’.⁴³ Emerging sensibilities favoured a relaxation of punishment and a shift toward correctional measures. It was a development to which imprisonment as a penal alternative would become pivotal.⁴⁴

The emerging sensibilities announced the Enlightenment’s culture of legal liberalism,⁴⁵ the principles of which promoted individual freedoms, equality under the law and the rule of law.⁴⁶ Reformers like Romilly sought to humanize punishment by proposing just deserts and proportionality as new frontiers to the power to punish. In principle, the frontiers did not disavow anything utilitarian in punishment, because they presumed the propriety of using commensurate exemplary punishments to achieve crime prevention. Their aim, therefore, was to stress the importance of demonstrating a connection between the amount of punishment and its anticipated result. It was as it were, an attempt to idealise a new penal economy, which integrated notions that punishment ought to be according to the offender’s deserts (proportionality), with the idea

Paley, a theologian and philosopher who wrote that the purpose of punishment is not to satisfy justice (*i.e.*, retribution), but to prevent crime. He argued that the measure of punishment was whatever was necessary to prevent a repetition of the crime, rather than on the basis of guilt, and that punishing the innocent is a necessary social price the victim pays for the welfare of his community. See William Paley *The Works of William Paley* (1838) 661 & 670.

⁴¹ Gatrell op cit note 26 at 590-59, see generally chapter 21.

⁴² See Johnson, Wolfe & Jones op cit note 28 at 149-150.

⁴³ Spierenburg op cit note 20 at 52.

⁴⁴ Foucault op cit note 18 at 75-77; Dirk Van Zyl Smit & Sonja Snacken *Principles of European Prison Law and Policy: Penology and Human Rights* (2009) 1-2.

⁴⁵ David Garland ‘Penal modernism and postmodernism’ in Thomas G Blomberg and Stanley Cohen (eds) *Punishment and Social Control* 2 ed (2003) 45-73 at 48-53; Garland also wrote that the effort to liberalize sought to end the control that state and religious establishment had over punishment.

⁴⁶ See Milan Zafirovski *The Enlightenment and its Effects on Modern Society* (2011) Springer, New York 28-30; Stephen Eric Bronner *Reclaiming the Enlightenment* (2004) 48-49.

that it should seek to prevent crime and involve the least painful penal measure calculated to achieve that outcome.⁴⁷

That said, eighteenth century reforms tended to have been more ideological than tangible. They did not fundamentally alter the *status quo*. As McGowen⁴⁸ observed, they ended up giving ‘more attention to punishment, not to its relaxation’. The promise of civilising punishment was largely unfulfilled,⁴⁹ while corporal and symbolic punishments remained. The only difference was that incarceration came into reckoning as a penal alternative and went on to become the centrepiece of eighteenth century penal transformations.⁵⁰

3.2.3 Rethinking Punishment in the Nineteenth Century

Nineteenth century debates about punishment became increasingly informed by utilitarian thinking. Old, punitive methods of punishment were denounced as irrational and counterproductive and driven by ‘emotion, instinct and superstition’.⁵¹ In their place, a rationalised system evolved, which promoted deterrence, reformation, rehabilitation and respect for the offender’s rights as ideals that punishment ought to promote. The system also sought to ensure that punishments were consistent with parsimony and that the offender’s potentials were preserved. The idea of painful punishment was abhorrent to this ideology.⁵²

The new outlook gave birth to the rehabilitative model, which regarded criminality as a pathological condition that can be treated like other medical ailments, through therapies that should last as long as was necessary to achieve a cure. The apparatus for accomplishing this was a penal institution that integrated prisoner welfare and social defence. Basically, it required ‘in-depth knowledge and in-depth intervention, individual investigation, and customized treatment regimes ...’⁵³ This apparently involved adapting the use of prison, from merely warehousing offenders for patently retributive purposes, to deploying prison as a correctional institution,

⁴⁷ Foucault op cit note 18 at 93-95.

⁴⁸ McGowen op cit note 21 at 85.

⁴⁹ McConville (1995) op cit note 13 at 131.

⁵⁰ Spierenburg op cit note 20 at 49-61.

⁵¹ Garland op cit note 45 at 51, see generally 50-53.

⁵² Ibid.

⁵³ Ibid at 187.

where advances in the behavioural sciences can be utilised to resocialise offenders through treatments that alter behaviour. The model went on to become the penal legacy of this era of the modern state.⁵⁴ However, individualizing punishment came with intractable problems. It gave judges unbridled discretion to impose open-ended prison sentences and to make release contingent on when the offender is deemed to have been cured of criminal behaviour.⁵⁵

Although the rehabilitative model offered a new penal rationality, thinking about punishment remained ambivalent and no acceptable standards crystallised. At any rate, the model failed to deliver on its promise, due to its focus on the criminal rather than the offence and its neglect of ‘crucial legal and sociological aspects of crime’.⁵⁶ Its underlying assumptions were proved wrong by rising crime rates and recidivism. Besides, it raised questions about the limits of the state’s power to punish, particularly the ethic and legitimacy of compelling offenders to undergo therapies they did not consent to and of incarcerating them indefinitely for longer periods than their offences deserved.⁵⁷ In the absence of guidelines for measuring sentence severity, the rehabilitative model encouraged sentencing inconsistencies.⁵⁸

There were further problems. Indefinite incarceration caused severely overcrowded, awful, inhumane and coercive conditions in prison.⁵⁹ Also, the model deepened erstwhile property relations and class structures, together with the social tensions that went with them, as most offenders belonged to an impoverished underclass. While rehabilitating them dominated political discourse on crime and punishment well into the twentieth century, recidivism made

⁵⁴ Norval Morris & David J Rothman (eds), *The Oxford History of the Prison: The Practice of Prison in Western Society* (1995) viii.

⁵⁵ AE Bottoms ‘An introduction to ‘the coming crisis’’ in AE Bottoms and RH Preston (eds) *The Coming Penal Crisis: A Criminological and Theological Exploration* (1980) 1-24 at 2.

⁵⁶ Ibid at 3; for example, the model neglected issues about criminal liability.

⁵⁷ See A Keith Bottomley ‘The justice model in America and Britain: Development and analysis’ in AE Bottoms and RH Preston (eds) *The Coming Penal Crisis: A Criminological and Theological Exploration* (1980) 27-28.

⁵⁸ Ibid, see 26-32.

⁵⁹ David J Rothman ‘More of the same: American criminal justice polices in the 1990s’ in Thomas G Blomberg & S Cohen (eds), *Punishment and Social Control* (1995) 29-30; Seán McConville ‘Local justice: The jail’ in Norval Morris & David J Rothman (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (1995) 297-327 at 302-304; see also Eduardo Rotman ‘The failure of reform: United States, 1865-1965 in Norval Morris & David J Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (1995) 169-197 at 170-171.

nonsense of the expectations and economic considerations that underpinned the model,⁶⁰ such that it became clear that correctional institutions were costly to run and failing to rehabilitate. British prisons at the time laboured under a major ‘crisis of legitimacy’.⁶¹

Amidst this crisis in Britain, the Lord Carnarvon Select Committee of the House of Lords was constituted to consider penal reforms. Some background to the Committee’s work is needful. In the late nineteenth century, crime and imprisonment rates in Britain were dwindling and alternatives to prison were emerging. However, there was a dilemma; hitherto, criminally ruthless and subversive elements were transported to the British colony of America as a form of punishment. America’s independence from Britain in the late eighteenth century halted that. In its place, convict prisons emerged in Britain.⁶² The treatment regime in these prisons comprised progressive penal servitude, which enlisted a combination of tight restrictions intended to purge, break, ‘test, encourage and deter’⁶³ the criminal through threats and inducements that offered a chance to reform. The treatment was gradually relaxed as the convict showed signs of improvement, with the benchmark for early release being good behaviour.⁶⁴ However, penal servitude came nowhere close to facilitating rehabilitation. Other categories of prisoners were housed in several other local prisons. Convict and local prisons were administered separately and this led to inconsistent penal standards in Britain.⁶⁵

⁶⁰ Rothman (1995) op cit note 59.

⁶¹ Mike Fitzgerald & Joe Sim *British Prisons* 2 ed (1982) 23. On the whole, the mesh of brutal and inconsistent punishments that the ideal promoted is the upshot of the ideas and policies that dominated punishment in the late nineteenth to late twentieth century. See McConville op cit note 13 at 131.

⁶² Britain stopped transporting convicts to penal colonies in America when the America’s war of independence started in 1775. This created an immediate pressure for convict prisons in Britain. Twelve years after the war broke out (i.e., 1787), Britain started transporting convicts to its colonies in Australia and it continued until 1868. Objections to transportation by the Australian colonies, and penal reforms in Britain accounted for its discontinuation. See John Hirst ‘The Australian experience: The convict colony’ in Norval Morris & David J Rothman (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (1995) 263-295 at 292-293; see also Victorian Crime and Punishment ‘Transportation’ available at <http://vcp.e2bn.org/justice/section2196-transportation.html>; <http://vcp.e2bn.org/justice/page11405-background-and-reasons.html>, accessed 13 July 2014.

⁶³ McConville (1995) op cit note 13 at 135.

⁶⁴ Ibid at 137-138.

⁶⁵ Local prisons consisted of houses of correction and other places that were used as pretrial detention centers, or to detain persons who were convicted of minor offences. Local prisons were run by counties or municipalities. See McConville (1995) op cit note 13 at 132-135; See also Seán McConville *English Local Prisons, 1860-1900: Next Only to Death* (1995) Chapter 6.

The Carnarvon Committee examined these inconsistencies and made critical observations, but of particular interest is the disdain it expressed for reforms that indulged convicts. The Committee ‘bemoaned the many and wide differences, as regards construction, labour, diet, and general discipline in the various Gaols and Houses of Correction in England and Wales, leading to an inequality, uncertainty and inefficiency of punishment, and productive of the most prejudicial results’.⁶⁶ Its response to these problems consisted of recommendations to centralize prison administration and ensure rigid adherence to procedures. It also encouraged a harsh penal tradition. Using epithets as ‘hard labour, hard board and hard fare’,⁶⁷ and punishment that ‘work[ed] on the senses to produce a state of constant misery, discomfort, and even some pain’,⁶⁸ the Committee promoted ‘a deterrent, depressive and severely punitive regime...’⁶⁹ It was drawn to such methods by resurgent crime rates that threatened public safety,⁷⁰ and a firm belief in the ability of severe penalties to deter crime. The recommendations became the corner stone of Britain’s penal practice from the mid-nineteenth century, as was evidenced by their inclusion in the Prison Act of 1865.⁷¹

Following these recommendations, prison sentence with hard labour became a ‘near universal substitute for flogging and other forms of corporal punishments.’⁷² As may be expected of these methods, prison conditions remained brutish. According to McConville,⁷³ hard labour meant hours of working the tread wheel, crank and capstan to no productive end. It involved intensifying the pains of imprisonment and making quartering conditions so bare that inmates could not hope for respite. A progressive dietary programme was also instituted, but the food allowances were basically starvation rations. Leisure was curtailed and prisoners were sequestered from each other. These conditions resulted in a public outcry,⁷⁴ and the first convict prison had to be demolished in 1893,⁷⁵ resulting in yet another need for new solutions.

⁶⁶ See McGowen op cit note 21 at 94.

⁶⁷ McConville (1995) op cit note 13 at 146.

⁶⁸ Ibid.

⁶⁹ Ibid at 83; see generally 64-86.

⁷⁰ McGowen op cit note 21 at 94; McConville (1995) op cit note 13 at 105-107.

⁷¹ No. 28 & 29 Vict. Cap. 126.

⁷² McConville (1995) op cit note 13 at 146-147.

⁷³ Ibid at 147, see generally 147-151.

⁷⁴ Ademola Ogunlewe *The Nigerian Prison System* (2007) 36.

⁷⁵ McConville (1995) op cit note 13 at 120.

3.2.5 Ideological and Political Variations in Penal Policies in the Late 20th Century

3.2.5.1 *The Failure of Rehabilitation and New Thinking about Punishment*

In late twentieth century, penal thinkers came up with new classifications to explain new thinking about punishment. It started with a series of contemporaneous developments in Britain and the United States of America. In the latter, ‘justice model,’⁷⁶ was used to describe efforts to counter the inadequacies of rehabilitative punishments in the US, by restoring focus on the criminal and his crime.⁷⁷ The concept was instigated by a number of factors. To start with, the period’s increasingly liberal intellectual culture deplored the arbitrary exercise of public power that accompanied the rehabilitative model and the inconsistent sentences it occasioned. Accordingly, it highlighted the need to regulate judicial discretion, ensure proportionate punishments and extend due process guarantees to punishment.⁷⁸ The method for achieving that was the justice model. The model reintroduced the concept of blameworthiness – which stood at the heart of classical retributivist thinking – into punishment, moderating same with the requirement that punishment must be deserved. This, in essence, was an effort to bring deserts, proportionality and parsimony together into a principled framework for regulating sentencing in the US. It disavowed disproportionate rehabilitative sentences, without rejecting utilitarianism altogether, as it also acknowledged the desirability of using punishment to achieve socially beneficial consequences.⁷⁹ However, it was sceptical of deterrence as a penal value, or of the possibility of ascertaining a specific amount of severity that would achieve deterrence.⁸⁰

⁷⁶ AE Bottoms op cit note 55 at 10.

⁷⁷ Ibid.

⁷⁸ See Garland op cit note 45 at 182-183; Bottomley op cit note 57 at 26-32.

⁷⁹ An excerpt of the Report of the Committee for the Study of Incarceration quoted in Bottomley op cit note 57 at 38-9 reads as follows: ‘We think that the commensurate deserts principle should have priority over other objectives in decisions about how much to punish. The disposition of convicted offenders should be commensurate with the seriousness of their offences, even if greater or less severity should promote other goals. For the principle, we have argued, is a requirement of justice, whereas deterrence, incapacitation, and rehabilitation are essentially strategies for controlling crime.’ See also Bottoms (1980) op cit note 55 at 10-11.

⁸⁰ Michael Cavadino & James Dignan *The Penal System: An Introduction* 4 ed (2007) 54-56.

Across the Atlantic in England, penal focus shifted to substantive justice.⁸¹ The shift lent much less weight to deterrence and, though the offender's individual circumstances might still be factored into sentencing, it was for the purpose of making moral assessments about the seriousness of the crime and the harm suffered. It was not an attempt to reintroduce traditional retributivist principles, as the question regarding an appropriate punishment was to be determined on a non-retributive and non-rehabilitative basis. While rehabilitation could still be sought (meaning punishment could still be individualized), it was not the overarching goal. The goal was to achieve a fairer, effective and possibly less punitive distribution of punishment.⁸² This apparently pointed to underlying liberal attitudes about punishment.

Although these developments in England shared some of the elements that were present in the American justice model, they were not so described. The British approach maintained an attachment to rehabilitation that prompted Bottomley⁸³ to call it the 'just-deserts theory of rehabilitation'. Yet another description by Bottoms⁸⁴ presented the developments as an evolving pattern of bifurcation in sentences that were imposed between 1948 and 1974. The sentences were generally less severe, but serious offences attracted longer fixed sentences while ordinary offences were treated to lenient measures, *i.e.*, short sentences and fines. Bifurcation was encouraged by increasing attention to the notion of the dangerous offender, *i.e.*, the psychiatrically ill, criminally violent or professional (habitual) offender against whom the State must act to protect the public. No less crucial though, were the failure of rehabilitation and the high costs of running prisons, which provided compelling reasons to use prison sentences less.⁸⁵ As a result, official penal policy endorsed and integrated bifurcation into the Criminal Justice

⁸¹ See Bottoms (1980) op cit note 55; Bottomley op cit note 57 at 42.

⁸² Bottomley op cit note 57 at 40-46 & 49. Bottomley applauded a report of the Committee for the Study of Incarceration titled "Doing Justice", which distinguished between the elements of actual harm done by the criminal act and the culpability or blameworthiness of the individual offender, saying the distinction provided a useful starting point, 'provided that the interpretation of blameworthiness is wide enough to include several aspects of the 'individualization' that had traditionally been closely tied to purely rehabilitative objectives'. Further, he observed that such a reassessment of individualization was part of Roger Hood's call in *Tolerance and the Tariff: Some Reflections on Fixing the Time Prisoners Serve in Custody*, for an enlightenment approach '[involving] a moral evaluation of the harm caused by criminal acts and "in the context of our understanding of the motivation of the offender and the interactions in the situations surrounding his act"'.
⁸³ Ibid.

⁸⁴ Bottoms (1980) op cit note 55 at 17-20; AE Bottoms 'Reflections on the renaissance of dangerousness' (1977) *Howard Journal of Criminal Justice* 70-96 at 70-76.

⁸⁵ Bottoms (1980) op cit note 55; Bottoms (1977) op cit note 84 at 87-89; see also Garland op cit note 45 at 202-203.

Act of 1972⁸⁶ and the official guidelines for release on parole issued by the British Home Secretary in 1975.⁸⁷

However, ‘bifurcation’ and its American equivalent came short of the ideal punishment. Both encouraged long sentences, the denunciation of which opened the way for the models in the first place. The support for long sentences was apparent in the bifurcation tendency, but with the justice model, the major criticism was against its tendency to accommodate traditional views about long retributive punishments. Bifurcation also grappled with the very difficult problem of determining dangerousness, especially in view of the particular propensity to make wrong predictions of dangerousness.⁸⁸ Nevertheless, the model provided a framework for working out a more rational approach to sentencing. Its insistence on punishments that are commensurate to the offender’s deserts became a central principle in sentencing guidelines that were developed in later years in Britain and America.⁸⁹

3.2.5.2 *The Socio-Political Context of New Attitudes to Punishment in Late Twentieth Century*

It has been rightly stated that criminal policy goes beyond finding technical solutions to the problem of crime.⁹⁰ Its development has to be pursued and explained in a broader political

⁸⁶ The Act increased penalties for some offences involving firearms. Also, in a bid to increase the use of non-custodial measures, it introduced community service and other measures.

⁸⁷ Problems however arose in relation to parole and the treatment of young offenders, which provided a basis for the guidelines. Convicts were denied participation in parole board hearings and the rights to know the reasons for parole denial, and to appeal parole decisions. The recommended solution was to judicialise parole and utilize principles that were akin to the justice model. See Bottoms op cit note 55 at 6-7 & 14; Bottoms (1977) op cit note 84 at 87-91; Bottomley op cit note 57 at 42; Garland op cit note 45 at 202-203.

⁸⁸ Predicting dangerousness has a high tendency for ‘false positives’. According to Bottoms, a false positive is posted when a wrong prediction is made that an offender will be violent, when in fact he may never commit a violent offence. A false negative may also be predicted, in which case an offender who is expected not to be violent commits violent acts upon release. Bottoms argued that empirical data suggests ‘there will always be a high level of false positives’ and that ‘the serious moral question of false positives cannot be evaded by pious hopes for the improvement of prediction techniques. It has also been argued that one of the practical consequences of a false positive is the continued detention of two or more non-violent offender after they have completed their lawful term in order to make sure that one violent offender is not released. See Bottoms (1977) op cit note 84 at 76-80.

⁸⁹ See chapter 6.

⁹⁰ John Lea ‘From integration to exclusion: the development of crime prevention policy in the United Kingdom’ (1997) being an article based on a talk given at a Conference titled ‘*Estrategias alternativas a la resolución penal de los conflictos sociales*’, at the University of Barcelona on November 6, 1997. Available at <http://www.bunker8.pwp.blueyonder.co.uk/misc/polis.htm>, accessed on 24 August 2012.

context.⁹¹ Indeed, the political traditions that formed the bedrock of Western society in the late twentieth century considerably influenced penal changes and judicial attitudes on punishment. According to Garland,⁹² the background to these changes lay in widespread disenchantment with the rehabilitative ideal, which ‘coincided with a powerful shift in the political orientation of several Western governments, with the result that penal organisations ... [became] more vulnerable to external political pressures than they might otherwise have been’. The changes were influenced by permutations in socio-economic policies as well.⁹³ Britain provides vivid illustrations.

Policy changes that occurred during this period originated in economic and social programmes of post-World War II economic reconstruction programmes led by a succession of Labour Party administrations. The programmes were based on Keynesian economics, a macroeconomic theory that construes active roles for government in stimulating economic growth, through increased public spending and job creation.⁹⁴ Accordingly, and with the initial support of Britain’s Conservative Party, the Labour government rolled out a programme of economic expansion, targeting unemployment, poverty and social vice, amongst others. Government assumed controlling stakes in production activities and invested heavily in social services and infrastructure, in promoting access to education, health care, housing and other social rights.⁹⁵ Its goal was to build a ‘cohesive, stable and homogenous society’⁹⁶ and establish a more tolerant, welfare-driven penal system.⁹⁷ By the 1960s however, it was becoming apparent that the anticipated benefits were not being achieved: poverty, social inequality and crime rates worsened in spite of massive investments in the economy. Public demands for more punitive

⁹¹ Ibid.

⁹² Garland op cit note 45 at 204.

⁹³ For an account of these changes, see Stephen Farrall ‘Rolling back the state’: Mrs. Thatcher’s criminological legacy’ (2006) Vol. 34 Issue 4 *International Journal of the Sociology of Law* 256-277, see particularly 259-273.

⁹⁴ Britannica ‘Keynesian Economics’ available at <http://www.britannica.com/EBchecked/topic/315946/Keynesian-economics>, accessed on 17 July 2014, John Lea (1997) op cit note 90; John Delwyn Holland *A welfare consensus? Social policy from Thatcher to Blair* (Unpublished PhD Thesis, Durham University 2009) 23-26.

⁹⁵ John Lea (1997) op cit note 90.

⁹⁶ Ibid.

⁹⁷ See 1970 Labour Party Manifesto titled ‘Now Britain’s strong – Lets make it great to live in’ available at <http://www.labour-party.org.uk/manifestos/1970/1970-labour-manifesto.shtml>, accessed 18 July 2014; Tim Newborn ‘Criminal justice’ in Pete Alcock, Margaret May & Sharon Wright (eds) *The Student’s Companion to Social Policy* 4 ed (2012) 366-374 at 369-370.

measures against crime increased in response, fed by general scepticism over welfare programmes for prisoners.⁹⁸

The Labour Party's response to these demands consisted in rather inconsequential changes that perpetuated discredited penal policies⁹⁹ and provided fodder for criticisms by the political opposition (the Conservative Party) that the Labour Party had gone soft on crime. Seizing the political momentum provided by mounting public angst over persistent crime problems, the Conservative Party went on to win the 1979 general elections, on the promise of a tough 'law and order'¹⁰⁰ response to crime. However, substantive policy engagements with crime were slow to come under the new administration of Margaret Thatcher, who merely continued with the liberal ideas of previous labour administrations.¹⁰¹ Radical changes commenced later, provoked by a combination of factors that came to a head during John Major's Conservative administration. These included the role that Thatcher's socio-economic policies played in driving up poverty, unemployment and crime rates.¹⁰² Major's reforms, which led to the development of more prisons, were predicated on unmistakable aversion for rehabilitation and a preference for long sentences. The reforms saw a dramatic increase in prison population.¹⁰³

⁹⁸ John Lea (1997) op cit note 90.

⁹⁹ Farrall op cit note 93 at 270.

¹⁰⁰ Ibid at 269-207; see also Margaret Thatcher's speech to the Conservative Party's Conference in 1977, available at <http://www.totalpolitics.com/speeches/conservative/conservative-party-conference-leaders-speeches/34193/speech-to-the-conservative-party-conference-1977.html>, accessed 24 August 2012.

¹⁰¹ Stephen Farrall & Colin Hay 'Not so tough on crime? Why weren't the Thatcher governments more radical in reforming the criminal justice system?' (2010) Vol. 50 *Brit. J. Criminol.* 550-569 at 552 & 562.

¹⁰² Farrall op cit note 93 at 265-273.

¹⁰³ Ibid at 270-271; see also Mick Ryan *Penal Policy and Political Culture in England and Wales: Four Essays on Policy and Process* (2003) 13-15. For an account of the progression and impact of Thatcher's crime policies and of the radical changes to penal policies that happened after the Thatcher years, see Farrall & Hay op cit note 101 at 550-69. To see how similar political forces influenced criminal policy in the United States of America during the Nixon, Johnson, Reagan and Bush administrations, see WM Oliver 'Executive orders: symbolic politics, criminal justice policy and the American Presidency' (2001) Vol. 26 No. 1 *American Journal of Criminal Justice* 18; Thomas G Blomberg & Carol Lucken *American Penology: A History of Control* 2 ed (2010) 8, 203; D Levinson (ed) *Encyclopedia of Crime and Punishment Vol. 1* (2002) 26; Katherine Beckett 'Political preoccupation with crime leads, not follows, public opinion' in M Tonry (ed) *Penal Reforms in Overcrowded Times* (2001) 40-5; G LaFree 'Declining violent crime rates in the 1990s: predicting crime booms and bursts' (1999) 25 *Annu. Rev. Sociol* 145-168.

3.2.6 Punishment and Human Rights in Britain: A New Dawn

Even though British penal policy evolved along a winding path as illustrated in the periods discussed above, some important principles emerged during these developments, which increasingly urged moderations in penal severity. Human sensibilities were also becoming more civilised. Some of these sensibilities found their way into important human rights instruments, such as the Magna Carter of 1215 and the Habeas Corpus Act of 1679, both of which sought to secure individual liberties from arbitrary deprivation and excessive punishments. The Bill of Rights of 1689 also included a prohibition against ‘cruel and unusual’ punishments.¹⁰⁴ These were important milestones, even if it took considerable time for the spirit of the instruments to permeate penal policies and practices.¹⁰⁵ Be that as it may, an irreversible trend had started. In 1951, Britain ratified the European Convention on Human Rights and Fundamental Freedoms (the Convention).¹⁰⁶ The step would later prove to be influential in entrenching a culture of respect for human rights in punishment.

Dramatically noticeable changes began in the 1970s,¹⁰⁷ when the European Court of Human Rights started handing down decisions that directly impacted British punishment. One such decision is *Tyrer v UK*,¹⁰⁸ where the court took a generally dim view of judicial corporal punishments. Although the court acknowledged that punishments generally had an element of humiliation or degradation, it held that birching in the particular circumstances of the case took punishment to a level that was so degrading as to violate the prohibition against degrading punishments in Article 3¹⁰⁹ of the Convention. By affirming that there were cases of birching that would not violate protected rights, the court was willing to allow that certain levels of degradation are ‘acceptable’ under the Convention.¹¹⁰ Following a pattern of similar decisions, a

¹⁰⁴ See The Bill of Rights 1689 Chapter 1 William and Mary Sess 2 c 2.

¹⁰⁵ See Anthony F. Granucci ‘Nor cruel and unusual punishments inflicted: The original meaning’ (1969) Vol. 57 No 4 *California Law Review* 839-865 at 844-860.

¹⁰⁶ The Convention was adopted in 1950.

¹⁰⁷ Levinson *op cit* note 103.

¹⁰⁸ *Case of Tyrer v. The United Kingdom*, Application no. 5856/72 (decided on 25 April 1978).

¹⁰⁹ Article 3 of the Convention prohibits ‘torture or inhuman and degrading treatment or punishment’.

¹¹⁰ The court has showed flexibility in other complaints involving Article 3, an example being *Costello-Roberts v. UK* Application no 13134/87; the case involved the administration of corporal punishment in a private boarding school. For repeatedly breaking school rules, the applicant was whacked three times on the bottom and through his shorts with a rubber-soled gym shoe. The European court held there had been no breach of art 3 of the Convention.

different penal climate surfaced in Britain, which made it doubtful that judicial corporal punishments ‘would pass muster however administered’.¹¹¹

More recent developments confirm a conscious turn in penal policy, even as decisions of the European Court continued to alter penal attitudes in Britain. Between 1987 and 2003, corporal punishment was progressively outlawed in public and private schools. Drastic pro-EU shifts occurred with the passage of the Human Rights Act 1998 (HRA),¹¹² which domesticated articles 2 to 12 and 14 of the European Convention, as well as protocols to the Convention. Particularly crucial in the HRA’s provisions are ss 2, 3 and 4. Section 2 obligates British courts to consider judgments, decisions, declarations or advisory opinions of the European Court of Human Rights, the European Commission on Human Rights and the Committee of Ministers when determining questions that are raised in connection with convention rights. Under ss 3 and 4, courts must interpret and apply legislation in a way that is compatible with ‘convention rights’, and may declare a primary or subsidiary legislation incompatible with convention rights, though they may not impeach the validity and enforceability of same. A declaration of incompatibility operates as an advice for legislative amendment by parliament.¹¹³

Much has been written about how these provisions affect the provisions of the Convention. It has been argued for example, that the provisions were passed with an eye on preserving parliamentary supremacy in Britain. Hence, the Parliament did not adopt all of the provisions of the Convention. Further, s 2 of the Act serves the purpose of not obligating English courts to follow judgments and other jurisprudence of the European Court of Human Rights and other EU bodies. English courts may not declare Acts of Parliament invalid even when they are incompatible with the Convention. This, in effect, means that the British Parliament can decide which of the Convention’s provisions it may allow to be enforced in Britain. This potentially weakens the Convention’s enforceability in Britain. Before the European Court, however, all

¹¹¹ DJ Harris, M O’Boyle, Collin Warbrick *The Law of the European Convention on Human Rights* (1995) 80-86.

¹¹² Human Rights Act 1998 Chapter 42.

¹¹³ See Janet Dine, James Gobert & William Wilson *Cases and materials on criminal law* 6 ed (2011) 30-31; See also Andrew Ashworth, ‘The European Convention and criminal law’ in J Beatson and Clifford Chance *The Human Rights Act and the Criminal and Regulatory Process* (1999) 37-44.

provisions of the Convention can be enforced against Britain.¹¹⁴ All said, European human rights have had significant impact on British punishment. In 2004, an amendment to the HRA domesticated the 13th Protocol to the Convention and effectively abolished the death penalty in Britain.¹¹⁵

At this juncture, it is necessary to see how the British colonies of South Africa and Nigeria were affected by penal developments in Britain.

3.3 Crime and Punishment in Seventeenth and Eighteenth Century South Africa

South African law reflects a history of colonial influence, starting first with the settlement of Dutch colonists in the Western Cape in the seventeenth century and continuing through the establishment of the British Cape Colony in 1795,¹¹⁶ to the expansion of colonial presence to Natal, Transvaal and the Orange River. This colonial history accounts for the Roman-Dutch law and English law features of South African law. Indeed, some developments in South African criminal law were so contemporaneous and similar to some seventeenth and eighteenth century developments in Roman Dutch law and English criminal law, as to suggest that some concepts or aspects of South African criminal law were rooted in these other legal systems.¹¹⁷ For example, the distinctions between criminal and civil law were as obscured in seventeenth to eighteenth century South Africa as they were imprecise in English and Roman-Dutch law at the time.¹¹⁸ Although the word ‘crime’ began to be used in medieval and eighteenth century Europe, it lacked any precise meaning in the penal lexicon of those periods.¹¹⁹ A distinction began to be

¹¹⁴ Eleni Frantzou ‘Human rights and British values: The role of the European Convention on Human Rights is the UK today’ (2013) *UCL Policy Briefing*.

¹¹⁵ Human Rights Act 1998 (Amendment) Order 2004.

¹¹⁶ A Barrat & P Snyman ‘Researching South African law’, (2005), available at <http://www.llrx.com/features/southafrica.htm>; accessed 20 April 2014.

¹¹⁷ John Dugard *South African Criminal Law and Procedure: Vol. IV, Introduction to Criminal Procedure* (1977) 3, 5-6, 18.

¹¹⁸ *Ibid* at 3 & 10.

¹¹⁹ G R Elton ‘Introduction: Crime and the historian’ in Cochburn J. (ed.) *Crime in England: 1550 – 1800* (1977); another example is torture, which was a legal procedure for extracting confessions under Roman-Dutch law. The criminal procedure in South African colonies followed the tradition; likewise the tradition of jury trials under Roman-Dutch and English common law. See Dugard op cit note 117 at 5, 7-9, 11 -12.

drawn in the sixteenth century, but vagueness persisted in Roman-Dutch connotations of the word. This, besides other manifestations of legal vagueness, prompted South Africa in later years to resort to English law, where concepts and principles of criminal law were beginning to achieve greater clarity. However, the greater influence of English law on South African law was in the law of procedure. Although a number of English common law notions of crime, such as murder, assault wove their way into statutes and judicial decisions in the colony, South African judges developed the concepts away from their English roots.¹²⁰

The temper of punishments in South Africa during the mid-seventeenth to late eighteenth century also tended to coincide with temperaments in Europe.¹²¹ Punishments were graphically and symbolically arranged to convey the harshest possible denunciation of the offender and his crime.¹²² Torture as a method of extracting confessions in criminal trials was widely practiced, while punishments were devised to jar the mind and leave the would-be offender with a sense of foreboding.¹²³ During the first British occupation of the Cape in 1795-1803, colonial officials

¹²⁰ EM Burchell 'Criminal law' in HR Hahlo & Ellison Kahn (eds.) *The Union of South Africa: The Development of its Laws and Constitution* (1960) 293. According to Burchell, English law had greater influence in criminal law than in other areas of South African law, due to the poor quality of Roman-Dutch law. As a result, present day South African criminal law is similar in many respects to the law of England. See also Dugard op cit note 117 at 23-26. For a discussion of how substantive English common law influenced South African criminal law, see John Milton *South African Criminal Law and Procedure: Common Law Crimes* 3 ed. (1996) 319-320, 409-412.

¹²¹ Ellison Kahn 'Administration of justice to 1910' in HR Hahlo & Ellison Kahn (eds.) *The Union of South Africa: The Development of its Laws and Constitution* (1960) 200-249 at 201-202.

¹²² Robert Ross *Status and Respectability in the Cape Colony, 1750-1870: A Tragedy of Manners* (2004) 16-17; Ross gives an example in the case of a sentence imposed on a convict who murdered a fellow slave. The convict was 'to be tied to a cross ... to have his limbs broken, from the bottom up [in other words, beginning with the legs], without the *coup de grace* and to remain there until the spirit shall have departed. His body will then be transported to the outer gallows field and then again tied to a wheel (rad), with the murder weapon above his head, as prey to the winds and the birds of the heaven'. Regarding this period, Van Zyl Smit wrote that criminal law in the early Cape Colony (i.e., seventeenth century) emphasised punishing the body, and 'was presented as a cruel and public spectacle'. It included tortures, public crucifixions, decapitations and deportations to cruel penal regimes on Robben Island. See Dirk van Zyl Smit *South African Prison Law and Practice* (1992), 7-8, 17-18.

¹²³ HR Hahlo and Ellison Kahn *The South African Legal System and its Background* (1968) 575 at note 48. The authors described punishment as follows: 'The ferocity of criminal sentences is almost unbelievable. Breaking on the wheel ..., impaling or burning alive, strangling, smothering, were the order of the day.... On 12th December, 1669, a slave woman, who suffering from small pox, had strangled her child, was sentenced by the Raad to be tied up in a bag and thrown into the sea ... Serving as a public slave in chains in Robben Island for ten or twelve years was one of the milder sentences. Women who committed adultery were liable to be sentenced to five years imprisonment Humiliating punishments were also frequent, e.g., the criminal might have to stand publicly exposed for a day carrying a placard showing his offence.... Wide use of torture was made Not surprisingly, after the 'full torture', the accused usually voluntarily confessed...'

sought to introduce contemporaneous reforms that were taking place in Britain.¹²⁴ These attempts at penal reforms persisted through the second occupation. Torture was abolished, and while the Roman-Dutch law of criminal procedure was retained, changes were introduced to the structure and jurisdiction of the courts.¹²⁵ Public exhibitions of punishment began to be de-emphasized.¹²⁶

It is noteworthy that the above reforms coincided with the progress of the slave abolition movement in Britain.¹²⁷ Up until the early nineteenth century, non-Europeans worked as slaves or low-level servants on Boer farms and endured brutal punishments.¹²⁸ With the abolition of slavery trade and slave labour, however, there emerged demands for new measures of social control, with the result that incarceration began to be seen as a penal alternative.¹²⁹ At the heart of the reforms implemented was Ordinance 50 of 1828, which sought to give non-Europeans equal rights with Europeans and free them from compulsory labour and indentured service. It also purported to give non-Europeans the rights to own land, work for wages and receive employment contracts, while also seeming to decriminalise vagrancy and reform punishments.¹³⁰ On the whole however, it is hard to determine the extent to which these reforms indicated that

¹²⁴ Van Zyl Smit op cit note 122 at 8.

¹²⁵ Jurisdictions were assigned to courts according to whether the offences were serious or minor. Minor offences attracted 'public scourging, transportation, banishment, or confinement for a limited period' and could be tried by district magistrates or officials. Offences that attract serious punishments were tried by the circuit court or the Court of Justice sitting with five members or as a full court, depending on the seriousness of the offence. See Dugard op cit note at 117 at 19-23.

¹²⁶ Ibid at 23 and 27. Public executions were accordingly reduced to twice a year, and public scourging was replaced by confinement at Robben Island. It was believed that frequent public exhibitions of punishment could weaken the impression it made on the mind.

¹²⁷ Andre Du Toit and Hermann Giliomee *Afrikaner Political Thought: Analysis and Documents* (1983) 78.

¹²⁸ South African History Online 'History of slavery and early colonisation in South Africa' available at <http://www.sahistory.org.za/south-africa-1652-1806/history-slavery-and-early-colonisation-sa>, accessed 6 January 2015.

¹²⁹ Van Zyl Smit (1992) op cit note 122 at 8; see also Dirk Van Zyl Smit 'South Africa' in Dirk Van Zyl Smit & Frieder Dunkel (eds) *Prison Labour: Salvation or Slavery?* (1999) 211 at 212.

¹³⁰ Note however, Keegan's arguments, that more than wanting to humanise the lot of non-Europeans, economic considerations underpinned the reforms. The subsisting system of forced labour 'tended to be counterproductive and likely to intensify resistance and conflict'. Nevertheless, Afrikaners interpreted the reforms as threats to their authority. See Timothy Keegan *Colonial South Africa and the Origins of the Racial Order* (1996) 103-106. Ultimately, the rights that were conceded to natives did not amount to much. For example, even when natives were given rights of access to courts, their testimony only had probative value when it was corroborated by other circumstances. The colonists also resisted attempts to curtail their powers to punish slaves, even though Ordinance 50 forbade magistrates from administering corporal punishments. See South African History Online, 'General South African History Timeline: 1800s' <http://www.sahistory.org.za/article/1800s>, accessed 20 April 2014; Bobby-Evans A, 'Ordinance 50' <http://africanhistory.about.com/od/apartheid/p/Ordinance50.htm>, accessed 20 April 2014.

the colonies were embracing an ideological shift.¹³¹ The path to reform was rendered difficult by Dutch colonists who opposed them – because they offered equal treatment to non-Europeans – and continued to employ brutal punishments.¹³² The colonists saw in the reforms a threat to sources of cheap farm labour. Indeed, colonial correspondences at the time showed that there was apprehension among colonists that the reforms would alter the socio-economic and political composition of the colony.¹³³

The above sentiments, occurring as they did in the early years of the colony, hinted at how property ownership and labour relations would later define the socio-political order in the colonial and post-colonial era, and the treatment of members of the social underclass. Essentially, the socio-political order promoted racial differentiation. Over time, natives (Africans) were made subservient to Europeans by laws that were in great measure calculated to retard their improvement and compel their perpetual submission and enslavement. The economy of the colonies was dependent on this policy and it necessitated racially differentiated approaches to crime and punishment as well. A major part of penal policy dealt extensively with how natives were to be punished. For errant slaves, the policy required varying degrees of severity for capital punishments.¹³⁴ The Cape Court of Justice even compared the system of differential punishments with practice in Western society, saying it was ‘a rule of conduct for the Courts of judicature all over Europe’.¹³⁵

¹³¹ At any rate, the shifts originated in the mother country. See Van Zyl Smit (1992) op cit note 122 at 8.

¹³² In particular, slaves were savagely punished. See Dugard op cit note 117 at 23 & 27.

¹³³ Keegan op cit note 130 at 103.

¹³⁴ Ibid at 86, 104-106.

¹³⁵ The validation is contained in a letter by the Court to Major-General Craig, on January 14, 1796. A translation of the letter is reproduced in Du Toit A. and Giliomee H. op cit note 127 at 91-94. Excerpts of it read as follows:

In our jurisprudence it is usual to punish with greater severity house breaking and theft, accompanied with murder, than theft alone, whether it is committed by free people or slaves ... These distinctions obtain so universally, that they almost amount to a rule of conduct for the Courts of judicature all over Europe, and in this country (South Africa) that they are observed equally with free people and slaves. Nevertheless, we cannot but observe, with regard to slaves, that the equality of punishment ceases when they commit offences against Europeans or free persons, particularly their masters; but this distinction is not peculiar to this country; on the contrary it is grounded upon analogy with the criminal law, according to which the distinction of persons is one of the essential points by which the degree of punishment is measured in most civilizations, and this distinction is especially founded upon the Imperial Laws or the Roman Laws... [O]ur modern slaves hardly consider the privations of life as a punishment, unless accompanied by such cruel circumstances as greatly aggravate their bodily suffering.

Racial differentiation regarding crime and punishment ensured that some of the reforms that took place in the colonies, which concurred with changing penal attitudes in Britain, especially with the emergence of the rehabilitative ideal, did not apply to natives. Colonist sentiments about natives remained crude and debates about law, order and equality exposed racial prejudices against reforms that threatened the political economy of the colonies.¹³⁶ It was a classic contest between irreconcilable liberal and conservative ideas, between liberalizing access to property on one hand and preserving exclusive control by colonists on the other. Over time, compromises were negotiated, but neither side could lay exclusive claims to representing the socio-political order. Both positions, it was said, would later have considerable influence on future 'Afrikaner political thinking'.¹³⁷

3.3.1 Penal Changes in the Nineteenth and Twentieth Centuries

Attitudes that fostered racial differentiations persisted through the nineteenth century, influencing how crime and punishment were defined. At the same time however, efforts to reform persisted and substantial changes were introduced to the four colonies that came under British administration. In 1869 public executions were stopped in the Cape Colony.¹³⁸ In 1903 Transvaal passed a comprehensive Criminal Procedure Code¹³⁹ that borrowed from English law and from the Cape's Criminal Procedure Act of 1828¹⁴⁰ and Evidence Ordinance of 1830. It also had elements of the Canadian,¹⁴¹ Queensland¹⁴² and Indian¹⁴³ criminal codes. Natal and the Orange Free State also adopted criminal codes that borrowed from English law and the criminal

¹³⁶ Ibid at 82, 87.

¹³⁷ Ibid at 87-88, but see generally 78 – 126.

¹³⁸ Dugard op cit note 117 at 27.

¹³⁹ Ordinance No 1 of 1903; see CG Van der Merwe, Jacques du Plessis, Marius de Waal et al 'The Republic of South Africa' in Vernon Valentine Palmer (ed) *Mixed Jurisdictions Worldwide: The Third Legal Family* 2 ed (2012) 95-215 at 162. Earlier in 1859, Transvaal enacted a criminal procedure code which adopted trial by jury and the accusatorial system of English law. However, jury trials began to fall seriously into disuse, and by 1935, the Minister of Justice could lawfully direct that a trial be without jury. Under s 113 of the Criminal Procedure Act, No 56 of 1955, an accused person could elect to be tried by a jury of 9 persons, and a jury decision would be carried by a majority of 7 jurors. The reforms regarding jury responded to the growing awareness that white juries were in several cases incapable of doing justice when deciding multi-racial crimes. See Dugard op cit note 117 at, 39-40.

¹⁴⁰ Act No. 40 of 1828.

¹⁴¹ Criminal Code, 1892 55-56 Victoria, Chap. 29.

¹⁴² Criminal Code Act 1899.

¹⁴³ Code of Criminal Procedure, Act No. V of 1898.

and evidence ordinances of the Cape Colony. After the four colonies merged in 1910 to form the Union of South Africa, the Criminal Procedure and Evidence Act 1917¹⁴⁴ was enacted to give the Union of South Africa a comprehensive procedural code.¹⁴⁵ The 1917 Act substantially re-enacted Transvaal's 1903 code. Subsequently, many provisions in the 1917 Act were re-enacted in the current Criminal Procedure Act of 1977.¹⁴⁶

The 1917 code brought uniformity and clarity to punishment. For example, it removed uncertainties in Roman-Dutch law regarding offences that were liable to the death penalty.¹⁴⁷ It also made the imposition of death sentences for treason, rape, housebreaking and robbery under aggravating circumstances subject to judicial discretion. For murder however, the death penalty was mandatory, save for the exceptions that a convicted murderer who is a nursing mother or a person under the age of 16 may not be sentenced to death.¹⁴⁸ The Supreme Court was also given unfettered discretion to impose fines and prison terms, unless there was a statutorily mandatory minimum period of imprisonment. A sentence of corporal punishment could not exceed 15 strokes.¹⁴⁹ Also, judges were given wide discretion in juvenile matters, but the object was to reform rather than punish.¹⁵⁰

An opportunity to take the reforms further came with the work of the Lansdowne Commission on Penal and Prison Reform. In its 1947 report, the Commission found that South African prisons 'maintain[ed] the previous harsh and inequitable prison system that preceded it'.¹⁵¹ Consequently, it recommended greater emphasis on rehabilitation, the extension of literacy programmes to offenders (especially black offenders)¹⁵² and other wide ranging changes that

¹⁴⁴ Act No. 31 of 1917, Ch. XIV.

¹⁴⁵ See Dugard op cit note 117 at 31-34.

¹⁴⁶ No 51 of 1977.

¹⁴⁷ Dugard op cit note 117 at 37.

¹⁴⁸ The 16-year age limit was raised to 18 years in 1959. From 1935, however, extenuating circumstances also became a reason to not impose the death penalty where it is mandatory. See Ellison Kahn 'The administration of justice in the Union' in HR Hahlo & Ellison Kahn (eds) *South Africa: The Development of its Laws and Constitution* (1960) 249-292 at 288.

¹⁴⁹ However, the maximum for the Cape and Transvaal was 50 strokes. See Dugard op cit note 117 at 40.

¹⁵⁰ Kahn op cit note 148.

¹⁵¹ Department of Correctional Services, Republic of South Africa, 'History of Transformation of the Correctional System in South Africa', available at <http://www.dcs.gov.za/AboutUs/History.aspx> [accessed 19 June 2013].

¹⁵² Ibid; see also Albie Sachs *Justice in South Africa* (1973) 68-94.

included improvements in prison administration.¹⁵³ Unfortunately, these recommendations were not implemented.¹⁵⁴ However, some changes were subsequently introduced through the Criminal Sentences Amendment Act of 1952,¹⁵⁵ which made corporal punishment compulsory for rape, robbery, culpable homicide, assault with intent to commit rape, robbery, or housebreaking.¹⁵⁶ However, a court could suspend a compulsory sentence of whipping if special circumstances were found to be present.¹⁵⁷ In practice though, corporal punishments seemed to have been frequently imposed,¹⁵⁸ and the gains of the reforms seemed to have been very limited.¹⁵⁹

In 1948, South Africa passed laws that institutionalized racial discrimination (*i.e.*, apartheid) and further cemented racial differentiation in punishment. The Criminal Law Amendment Act of 1953¹⁶⁰ and the Public Safety Act of 1953¹⁶¹ criminalised political protests and prescribed whippings and imprisonments of up to five years. Violations of the laws were harshly dealt with and studies showed a spike in prison sentences.¹⁶² Nevertheless, concerns about penal reforms persisted and some changes were in fact introduced through the Criminal

¹⁵³ A St. Q Skeen 'Criminal law' in Willem Adolf Joubert (ed) *The Law of South Africa*, Vol. 6 (1996) 18.

¹⁵⁴ Department of Correctional Services op cit note 151.

¹⁵⁵ No 33 of 1952.

¹⁵⁶ Section 338(2). Under this section, a sentence of whipping must be imposed if the court did not pass a sentence of death and where culpable homicide involved assault with intent to commit rape or robbery. However, a sentence of whipping would not apply where the convict has been declared a habitual offender, pursuant to s 344 of Act 31 of 1917.

¹⁵⁷ Section 4.

¹⁵⁸ The Act also empowered the court to impose an indeterminate prison sentence whenever it declared a convict a habitual offender. The declaration was obligated when an offender was convicted of three or more offences under Part II of Third Schedule to the 1917 Act, regardless of the time that elapsed between the commission of the offences, or their seriousness. Although these measures sought to impose restrictions on the use of discretion, interpreting them was prone to inconsistencies and injustices. For example, in relation to offences under Part II of the Third Schedule to the 1917 Act, a third conviction in a row would earn the convict an indeterminate sentence, without regard to the fact that one of the convictions may have been for a trivial offence committed in distant memory. To redress the problems, the Criminal Sentences Amendment Act 33 of 1952 was passed. Among other things, it made judicial declarations of the habitual offender contingent upon a third conviction, where the two previous prison sentences on the offender amount to at least twelve months, and were received within ten years of the current offence. All three convictions must have been for offences under Part II of the Third Schedule. See Kahn op cit note 148; See Dugard op cit note 117 at 40; see generally RF Ascham 'The Whipping Act' (1954) Vol. 71 *S. African L.J.* 145-152.hs

¹⁵⁹ Department of Correctional Services op cit note 151; see also Sachs op cit note 152.

¹⁶⁰ No. 8 of 1953.

¹⁶¹ No. 3 of 1953.

¹⁶² Albie Sachs op cit note 152.

Procedure Act of 1955.¹⁶³ The Act's approach to punishment was reformation oriented and the measures it prescribed moved considerably away from deterrence and retribution. It enlisted short term imprisonment for corrective training, periodical imprisonment for less serious crimes and preventative incapacitation. It also abolished imprisonment with forced labour. These changes occurred when permutations in penal policy in Britain forced rehabilitation to lose its appeal. Although the changes were sensitive to the reasons for the failure of rehabilitation in Britain,¹⁶⁴ growing apprehensions of the political opposition to apartheid provoked legislative responses that increased the range of offences for which the death penalty could be imposed.¹⁶⁵ There was a corresponding rise in the use of the penalty. Executions in South Africa accounted for 47 per cent of the global toll in the mid to late twentieth century.¹⁶⁶

Following persistent clamour for comprehensive reforms, the Viljoen Commission of Enquiry into the Penal System of South Africa was constituted in 1974.¹⁶⁷ The Commission's recommendations were decisively aimed at rehabilitation. After strongly rejecting mandatory sentences and excessive reliance on imprisonment, it recommended community based

¹⁶³ Act No 56 of 1955. The Act consolidated the numerous amendments to the 1917 Act. There were several substantial changes after 1955. In 1959, sentences of periodic (i.e., weekend) imprisonment, imprisonment for corrective training, and imprisonment for the prevention of crime were introduced. Compulsory whippings were abolished in 1965, leaving courts with discretion on the subject. Criticisms of compulsory imprisonment for the professional criminal led to reforms in 1968 that gave courts discretion to impose such prison sentences and to declare a person a habitual offender. See Dugard op cit note 117 at 47.

¹⁶⁴ See du Toit & Giliomee op cit note 127 at 82, 87.

¹⁶⁵ The General Law Amendment Act No 76 of 1962 at s 21, made any person who was guilty of sabotage liable to punishments imposed for treason, i.e., the death penalty; s 5 of the General Law Amendment Act No 37 of 1963 made it an offence for a South African who is resident abroad to encourage violent change in South Africa. The Act also allowed 90-day detentions without warrant of a person who is suspected of a politically motivated crime; further, the Act made the training of a South African resident abroad for the purpose of promoting communism, an offence punishable with the death penalty; lastly, s 2 of the Terrorism Act no 83 of 1967 was used to target anti-apartheid activities. See Dugard op cit note 117 at 46-47.

¹⁶⁶ Dugard op cit note 117 at 46-47. According to Dugard, a survey examined the judiciary and racial bias in sentencing, and concluded that blacks were more likely than whites to receive the death penalty even if they had committed the same offence. The research suggests that blacks were more likely to receive the death sentence especially when the victim is white. For example, between 1948 and 1966, 288 whites were convicted of rape on blacks where 844 blacks were convicted of rapes on whites. No death sentence was passed on the white offenders but black convictions resulted in 121 death sentences. Between June 1982 and June 1983, 81 blacks were convicted for murdering whites and 38 were hanged. 52 whites were convicted for murdering whites but one was hanged. Of the 21 whites that were convicted for murdering blacks, none was hanged. However, 55 of 2208 blacks convicted for murdering blacks were hanged. See generally 'Contempt of court? The trial of Barend van Dyk van Niekerk (1970) *Acta Juridica* 77-218.

¹⁶⁷ See Republic of South Africa *Report of the Commission of Inquiry into the Penal System of the Republic of South Africa* (1976).

alternatives to prison, the curtailment of corporal punishment, the use of pre-sentence reports and the involvement of behavioural experts in sentencing.¹⁶⁸ The Commission also addressed the problem of excessive criminalisation of conduct.¹⁶⁹ Its recommendations resulted in the abolition of ‘corrective training’ and ‘prevention of crime’ - forms of mandatory imprisonment that had been much criticised for making sentencing unduly rigid – under the Criminal Procedure Act 1977.¹⁷⁰

Unfortunately, the political rationality that underpinned apartheid did not allow the reforms to take full effect. Segregation in penal policy was a necessary part of apartheid’s strategy for fending off growing threats to the socio-political order. Indeed, it has been suggested that establishing the Viljoen Commission had more to do with rethinking how apartheid interacted with the issues of crime and punishment, than it had to do with reforms. Thus, the changes that followed rehashed apartheid’s segregationist and repressive penal policy.¹⁷¹ Official nuances about crime and punishment continued to reinforce the ownership and class structures that underpinned the political system. Segregationist terminologies framed issues about delinquency: while delinquency among white proletarians was addressed through ‘stabilization’ measures that involved non-institutional community based interventions, black delinquents were regularly sentenced to imprisonment, apprenticeship, caning, fines and removal to rural areas.¹⁷² Even when intense political opposition forced the apartheid state to rethink its ideology, it re-invented racial differentiation in punishment on the basis that South Africa’s heterogeneous races

¹⁶⁸ Ibid at 70-78, 93-94, & 98-121; see also James O Midgley ‘Corporal punishment and penal policy: Notes on the continued use of corporal punishment with reference to South Africa’ (1982) Vol. 73 Issue 1 *Journal of Criminal Law and Criminology* 388- 403 at 401.

¹⁶⁹ See Republic of South Africa op cit note 167 chapter 2; see also Jonathan Burchell & John Milton *Principles of Criminal Law* 3 ed (2005) 62-67.

¹⁷⁰ Act 51 of 1977. Dugard op cit note 117 at 6, 102; Dugard noted that this was especially so with regard to compulsory sentences. See also SA Strauss ‘Criminal Procedure’ (1976) *Ann. Surv. S. African. L.* 435-484 at 437ff. The 1977 Act retained the declaration a convicted criminal as a habitual offender, but subjected same to judicial discretion.

¹⁷¹ Super op cit note 7 at 430; see generally pp 429-32. It has been suggested that sentencing during apartheid was ‘broadly’ influenced by the objects of prevention and deterrence, as well as the need for ‘fairness and consistency’. However, it has also been argued that apartheid politicized punishment. See Amanda Dissel, ‘Tracking Transformation in South African Prisons’ at http://www.ccr.uct.ac.za/archive/two/11_2/transformation.html, accessed 20 April 2014; J Le Roux “The impact of the death penalty on criminality” Paper prepared for the 17th International Conference of the International Society for the Reform of Criminal Law, 24 – 28 August 2003, available at <http://www.isrcl.org/Papers/LeRoux.pdf>, accessed 20 April 2014.

¹⁷² Linda Chisholm ‘Education, punishment and the contradictions of penal reform: Alan Paton and Diepkloof Reformatory 1934 –1948’ (1991) Vol. 17 Issue 1 *Journal of Southern African Studies* 23-42.

were at different stages of development, which made different approaches to punishment necessary. For black offenders, that meant punishments that targeted the body.¹⁷³

These policies marked a dark era in South Africa's criminal justice system. Official artifice about penal reforms wore thin as resistance to apartheid deepened. Unfortunately, the judiciary was caught up in apartheid's moral dilemma. While not all judges supported the ideology (some in fact called for the abolition of the death penalty,¹⁷⁴ which at the time was politicised), they were generally passive or willing implementers of apartheid justice. As opposition to apartheid intensified in the 1980s, arrests and trials for political offences spiralled to distressing levels. So did judicial executions, which rose to become one of the highest in the world. Most death penalty convictions in the 1980s and 1990s were for political offences and its 'victims' were more likely than not blacks and coloureds who resisted apartheid.¹⁷⁵ Prison also became strongly associated with the repressiveness of apartheid. Lengthy prison sentences spiralled in the mid-1980s. By the early 1990s, about 32,000 young offenders were whipped annually in execution of judicial sentences.¹⁷⁶ In the early 1990s, however, tidal changes began to sweep through the political landscape. No longer able to sustain its repressive rule, the apartheid government was forced to lift restrictions on political activity and to negotiate a political transition to constitutional democracy. As part of the negotiations, executions were put on hold.¹⁷⁷

¹⁷³ Super op cit note 7.

¹⁷⁴ Mr. Justice Booyesen is on record for describing the experience of passing a death sentence as the most distressing thing that he would abolish if given the opportunity. See Amnesty International *South Africa: Statement submitted by Amnesty International to the United Nations Committee against Apartheid*: (1989) 3.

¹⁷⁵ Ibid. See Amnesty International '1989 Campaign against the death penalty – Country appeals series, Circular 26B – Action on South Africa during campaign phase two – South Africa: The death penalty' AFR 53/20/89, available at <http://www.amnesty.org/en/library/asset/AFR53/020/1989/en/691b284f-ee73-11dd-96f1-9fdd7e6f4873/afr530201989en.html>, accessed 08 August 2013. The circular reports there were 1593 executions between 1978 and 1987. In the same period, there was an unbroken upward trend which peaked at 164 executions in 1987. Nine of the 164 executed were whites.

¹⁷⁶ Super op cit note 7 at 428 & 431.

¹⁷⁷ Ibid.

3.3.2 Crime and Punishment in Post-Apartheid South Africa

The post-apartheid era in South Africa has witnessed important changes in penal policy and sentencing. The following discussion reviews the changes in phases.

3.3.2.1 Criminal Justice Policy during the Transition to Democracy

A consequence of racialising and politicising penal policy during apartheid was that the liberation movement led by the African National Congress (ANC) came to regard the criminal justice system as a tool of repressive rule. Crime and punishment, as the ANC saw it, symbolized power relations in the Apartheid State, or was concomitant with the ‘structural violence’ of its ideology.¹⁷⁸ However, the ANC had a poor grasp of the crime problem in South Africa, before and soon after apartheid. No sooner had apartheid’s segregationist restrictions been relaxed than conventional crime rates shot up.¹⁷⁹ Two explanations have been proffered for this. For one thing, apartheid’s crime prevention policies focused on conventional crime white communities. In this regard, studies imply a substantial ‘dark figure’ of unrecorded crime in South Africa, which, given ‘the vagaries of apartheid recordkeeping’, focused on reporting crime in white communities.¹⁸⁰ The other explanation is that the ANC’s preoccupation with the liberation struggle turned the attention of its leaders away from the stark realities of crime in black communities.¹⁸¹

Given its perception of apartheid criminal policy, the ANC opted for a humanitarian approach to crime and punishment,¹⁸² and constructed crime and criminality as consequences of the inequities imposed by apartheid. This outlook resulted in attempts to address the crime problem through strategies that wove social policy into crime prevention. The strategies ranged between criminalising social policy and socialising crime prevention. Strategies that criminalise

¹⁷⁸ Ibid at 428.

¹⁷⁹ Ibid at 433. The restrictions were relaxed as part of the negotiations to end apartheid. Attacks on whites (in their homes) and the police were reported to have increased.

¹⁸⁰ See Mark Shaw ‘South Africa: Crime in transition,’ Institute for Security Studies, Occasional Paper No. 17 (March, 1997); available at www.iss.co.za/pubs/papers/17/Paper17.html; see also Anton Du Plessis & Antoinette Louw ‘Crime and crime prevention in South Africa: 10 years after’ *Canadian Journal of Criminology and Criminal Justice* (April 2005), 427-446 at 428.

¹⁸¹ Ibid.

¹⁸² See Super op cit note 7 at 7-9.

social policy enlist ‘social policy ... as a first line strategy against crime’.¹⁸³ They endorse crime reduction as the primary reason behind mainstream welfare programmes, rather than the by-product.¹⁸⁴ On the other hand, strategies that socialise crime prevention adopt ‘the increased use of people-centred welfare measures ... as ends in themselves and not mere means to the end of reducing crime’.¹⁸⁵ However, both approaches overlap in the sense that they find the causes of crime in ‘social, economic and environmental conditions’¹⁸⁶ and believe that redressing those conditions alleviates crime.¹⁸⁷ The difference lies in the emphasis in the roles that each approach attaches to social policy; while one funnels social policy into crime reduction,¹⁸⁸ the other sees better livelihoods, improved living standards, crime prevention and other welfare programmes that improve human conditions as equally legitimate objects of social policy.¹⁸⁹ Yet another approach, which was compelled by troubling crime statistics soon after the democratic transition in 1994, laid emphasis on law enforcement, *i.e.*, the arrest and conviction of offenders.¹⁹⁰

Scholars have pointed out that all three methods were evident in the different programmes that post-apartheid ANC administrations adopted in their response to the crime and safety question,¹⁹¹ starting first with the adoption of the Reconstruction and Development Programme (RDP) in 1994. The RDP tended to address crime and safety problems through social policy interventions. In other words, the ANC subsumed crime under its socio-economic development and democratization policy.¹⁹² The misjudgement in this approach came to the fore two years later, when public fear escalated over rising crimes. Surveys indicated that the percentage of those who felt that crime was a pressing concern doubled over a space of three

¹⁸³ Bill Dixon ‘Development, crime prevention and social policy in post-apartheid South Africa’, *Critical Social Policy* Vol. 26 (2006), 169-191 at 173.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid* at 174-175.

¹⁸⁶ Du Plessis and Louw op cit note 180 at 430.

¹⁸⁷ *Ibid* at 430.

¹⁸⁸ Dixon op cit note 183 at 172-173 & 175.

¹⁸⁹ *Ibid.*

¹⁹⁰ Du Plessis and Louw op cit note 180.

¹⁹¹ *Ibid*; Dixon op cit note 183.

¹⁹² Dixon op cit note 183 at 177; see also Republic of South Africa, ‘White Paper on Reconstruction and Development’, *Government Gazette* Vol. 353 No. 16085, (23 November 1994), 8-9. The White Paper recognized peace and security as one of its six basic principles, but it failed to articulate a measure for combating crime in its five developmental programmes. The functions allotted to the Ministry of Safety and Security were focused on promoting community policing, indicating the ANC’s belief that policing, having been deployed as an instrument of repression in the apartheid era, was a potential threat to the new government. See p. 74 of white paper.

years between 1995 and 1997, so that by 1998, more than 20 per cent of the respondents indicated that crime had become a top concern, behind service delivery and jobs.

This increase in the fear of crime produced a corresponding decline in public confidence in the ability and willingness of the state to deal with it. The crime situation and the criticisms it generated began to make government look very inefficient,¹⁹³ forcing it to reconsider its crime policy. The responses that followed were articulated in National Growth and Development Strategy and National Crime Prevention Strategy (NCPS)¹⁹⁴ amongst other crime policy documents.¹⁹⁵ They introduced a series of policy readjustments that reflected the ANC's increasing awareness that crime's threat to democracy and economic development required a decisive response.¹⁹⁶ These readjustments would eventually blend crime prevention and law enforcement into a framework that sought two objectives: to move further away from the structural abuses of apartheid while still showing resolution against a skyrocketing crime problem.¹⁹⁷

The measures were hardly enough to assuage public apprehensions over crime. One of the platforms for articulating public concerns over government's inability to head off rising crime rates was the NEDCOR Project on Crime, Violence and Investment, a private sector initiative that was prompted by concerns within business circles that the crime problem could make the country ungovernable, was deterring foreign investments and tourism, and had led to an exodus of highly skilled South Africans. There was also the perception within those circles

¹⁹³ Super op cit note 7 at 435.

¹⁹⁴ Available at <https://www.issafrica.org/crimehub/uploads/National-Crime-Prevention-Strategy-1996.pdf>, accessed August 8 2015.

¹⁹⁵ See Janine Rauch 'Changing step: Crime prevention policy in South Africa' in Eric Pelser (ed) *Crime Prevention Partnerships: Lessons from Practice* (2002) 9-26; Gareth Newham 'The relevance of the National Crime Prevention Strategy for sustainable development in South Africa' (1999) being a research report written for the Centre for the Study of Violence and Reconciliation in June 1999, available at <http://www.csvr.org.za/index.php/publications/1517-the-relevance-of-the-national-crime-prevention-strategy-for-sustainable-development-in-south-africa.html>, accessed 7 January 2015.

¹⁹⁶ Dixon op cit note 183 at 176-185; the National Growth and Development Strategy made safety and security as one of its six pillars. The National Crime Prevention Strategy (NCPS) was the 'core component' of this pillar. Thus, the NCPS was adopted as an 'overarching policy on crime prevention' that would result in the establishment of a comprehensive policy to address crime in a coordinated manner. See National Crime Prevention Summary: Summary' available at <http://www.info.gov.za/otherdocs/1996/crime1.htm#1>; Republic of South Africa 'White Paper on Reconstruction and Development' op cit note 192 at 74.

¹⁹⁷ Super op cit note 7 at 435.

that the ANC government was soft on crime. After examining the causes of the crime situation and evaluating how it impacted investment, the project report warned that South Africa was losing up to five per cent of its gross domestic product to the crime problem. Although it commended the NCPS for its long term strategy, it criticised government's lack of urgency and decisiveness in tackling crime. It called for short term crime prevention measures that guaranteed safety and security for citizens, warning that if government failed in this basic responsibility, 'it would eventually fail in other areas'¹⁹⁸ of governance.

Although state officials became defensive of their policies,¹⁹⁹ the criticisms had the effect of shifting official attitudes. '[P]oliticians of all stripes began to support harsh sentencing reforms that appeared primarily to serve "ideological goals"...'²⁰⁰ The outcome was a new punishment paradigm, an ideological shift in penal policy that has been described as 'punitive humanism'.²⁰¹ The paradigm sought to balance public demands for tougher sanctions against criminals on one hand, with the no less important need to humanize and conform punishment to human rights guaranteed by the Constitution. The latter aim became evident in the eventual rejection of the death penalty and corporal punishments, a development to which two judicial discussions (discussed in the next section) were pivotal. The former gave birth to the minimum sentencing requirements in the Criminal Amendment Act 105 of 1997.

Section 51 of the Act offered a range of steep punishments intended to satisfy popular demands for tough measures for serious crimes. It also sought to introduce consistency into sentencing. It introduced minimum sentences into South Africa's sentencing law, recommending penalties ranging from five years to life imprisonment for a number of serious offences that included murder, robbery with aggravating circumstances and rape. The provision

¹⁹⁸ Dixon op cit note 183 at 179-180.

¹⁹⁹ See for example statement issued by Ministry for Safety and Security on the Nedcor Project on Crime, Violence and Investment at <http://www.polity.org.za/polity/govdocs/pr/1996/pr0611a.html>, accessed August 8 2015.

²⁰⁰ Super op cit note 7 at 435.

²⁰¹ Ibid at 433-4; the author uses the term to explain 'a move toward liberalization ... coupled with harsher pro-minimum sentencing...' Liberalization describes a process of humanizing punishment, as evidenced by the abolition of the death penalty and corporal punishments.

obliged courts to impose the minimum sentences unless ‘substantial and compelling circumstances’ ‘[justified] the imposition of a lesser sentence’.²⁰²

However, the implementation of the Act drove up incarceration rates in South Africa and lengthened prison sentences. In its 2000 report, the South African Law Reform Commission²⁰³ observed increases in sentence severity within two years of the Act’s enactment. Thus, while the ANC government showed intent to humanize punishment, it looked to longer prison terms as a crime control measure. This approach has since characterized punishment in the post-apartheid era. Although initially intended as an interim measure, the life of the Act has been extended a number of times.²⁰⁴ How s 51 has impacted South Africa’s sentencing landscape will be discussed in chapter 5. In 2007, the Criminal Law (Sentencing) Amendment Act²⁰⁵ introduced amendments to s 51 and made the provision a permanent feature of sentencing for certain sexual offences.²⁰⁶

3.3.2.2 *The Political Rationality of Punishment in the Constitutional Era*

It should be noted that by the time minimum sentencing provisions were adopted in 1997, South Africa’s sentencing jurisprudence had established a strong link between human rights and punishment. Early steps toward humanising punishment started with a moratorium on death penalty during negotiations to end apartheid. Negotiations on the country’s Constitution ultimately left the question on the constitutionality of the death penalty for courts to resolve. The Constitutional Court did this in *S v Makwanyane and Another*.²⁰⁷ However, prior to

²⁰² Sandra M Roth ‘South African Mandatory Minimum Sentencing: Reform required’ (2008) 17 Minn. J. Int’l L. 155-182 at 162-163.

²⁰³ South African Law Commission ‘Sentencing: A sentencing framework’ (2000) 32. According to the Commission, ‘sentences of 7 to 10 years, 10 to 15 years, 15 to 20 years, and 20 years to life ... increased ... by 50%, 67%, 70% and 124% respectively’.

²⁰⁴ Roth op cit note 202.

²⁰⁵ No 38 of 2007.

²⁰⁶ *S v Vilakazi* 2009 (1) SACR 552 (SCA) at 558 paras C-D.

²⁰⁷ 1995 (2) SACR 1 (CC).

Makwanyane, the Constitutional Court had occasion to define the new values that would underlie punishment in the post-apartheid state in the case of *S v Williams and Others*.²⁰⁸

In *Williams*, the court outlined the political rationality of South Africa's constitutional democracy, the liberation struggles that underpinned it and the implications these had for crime policy. It construed the court's role in the democratic state as consisting in an obligation to ensure that the new political character of the nation is grounded in respect for constitutional rights. The obligation required courts to pay attention to how their judicial functions may impact individual rights.²⁰⁹ Employing the 'determinative test'²¹⁰ which describes those values that are inherent to a constitutional democracy and against which the validity of actions must be measured, the court reasoned that a new penal rationality had been introduced into the Constitution, which necessitated courts to move progressively from retributive and deterrent punishments towards punishments that embraced corrective and preventative values, as well as human rights.²¹¹ It was on the basis of this reasoning that the court found corporal punishments to be in violation of constitutional protections against cruel, inhuman and degrading punishments. The court held as follows:

The Constitution clearly places a very high premium on human dignity and the protection against punishments that are cruel, inhuman and degrading; [T]he Constitution ensures that the sentencing of offenders must conform to standards of decency recognized throughout the civilized world. Thus it sets a norm; there is no place for brutal and dehumanising treatment and punishment...²¹²

The court developed this rationality further when it ruled the death penalty unconstitutional in *Makwanyane*. The case is notable for the court's exegesis of how cultures of punishment are defined by the political rationality of each society. Whereas apartheid fostered a legacy of hostile racial relations and gross human rights violations that spilled over into punishment, South Africa's transition to constitutional democracy ushered in a new political rationality, which transcended the acrimonious divisions of the past to articulate a new commitment to national understanding and reconciliation. The new commitment, as the court

²⁰⁸ 1995 (3) SA 632 (CC).

²⁰⁹ Ibid at 635 para G – 636 para B.

²¹⁰ Ibid at 648 paras C-D.

²¹¹ Ibid.

²¹² Ibid at 654 paras E-H.

rightly observed, was rooted in political considerations that were indispensable to the need for new attitudes to punishment. The court then articulated a new paradigm of punishment that placed the Constitution's Bill of Rights at the heart of it all.²¹³

Read together, *Williams* and *Makwanyane* developed a new penal ethos for the post-apartheid State. The decisions found that courts had a constitutional responsibility to elaborate how the political culture that is envisioned by the Constitution applied to punishment. This meant envisioning punishment in a transformative or restorative role. The decisions effectively communicated that courts were to pursue liberal and humane ideals in punishment. Subsequent judicial sentences have done so. They have established strong linkages between punishment and a theory of constitutionality, or a theory of rights that are secured by constitutional guarantees. Some of the decisions will be discussed later in this thesis.

3.4 Penal Evolution in Nigeria

3.4.1 Criminal Law at the Inception of British Rule

Before Britain's colonial venture in Nigeria, distinct systems of customary criminal law were enforced in the many autonomous nationalities that came under colonial administration. These nationalities administered justice according to traditional constructs of concepts like criminal liability, due process, punishment and justice. The concepts varied between nationalities (or even between communities) as each nationality defined its penal system according to its value system.²¹⁴ For administrative convenience, the colonialists allowed indigenous customs and institutions to continue to regulate criminal matters among natives. This approach was articulated in a colonial policy of non-interference in native affairs contained in the Order-in-Council of 1872. Under the Ordinance, English criminal law and jurisdiction applied only to British subjects in territories that came under British protection.²¹⁵ However, as colonial ambitions extended

²¹³ Ibid at 52 para G - 53 paras B.

²¹⁴ AG Karibi-Whyte *History and Sources of Nigerian Criminal Law* (1993) 64-65.

²¹⁵ Ibid. Citing Mr. Marshal, the Chief Justice of the Administration who was known to have 'favoured non-interference in these institutions,' Karibi-Whyte wrote that native communities had 'their own laws and customs

inland beyond the West African coastline, the policy of non-interference yielded to a new policy of indirect rule. Indirect rule subjected indigenous political institutions to the supervisory control of Colonial Administrators.²¹⁶ Starting from 1885, English criminal jurisdiction was extended to consenting natives. These developments brought about parallel criminal jurisdictions; English law applied to non-natives and natives who consented, while customary criminal law applied to natives who did not consent to English criminal law. Subsequently, a strict separation between the two systems was established by a duo of 1901 Ordinances,²¹⁷ resulting in parallel court systems. English type courts enforced English criminal law, while native courts implemented customary criminal law.

However, the power of native courts to apply customary criminal law and punishment was considerably circumscribed by the Ordinances. Native courts had to comply with the statutory requirement that the customs they applied and the decisions they passed conform to the principles of English law and be not repugnant to natural justice, good conscience and equity (i.e., the repugnancy test).²¹⁸ Their decisions were also subject to review by colonial officers and English type courts, which used the power of review to control and, where necessary, alter and conform native court decisions to English principles and perceptions about justice. These developments substantially altered the character of customary criminal law.²¹⁹ They imposed restrictions that made customary law punishments statutory in character. ‘The only truly native element [that remained] was that exercise of jurisdiction was mainly over natives.’²²⁰ With time, customary criminal law gradually came to be replaced by English forms of criminal justice.²²¹

which are better adapted to their conditions than the complicated system of English jurisprudence”. Adopting these laws and customs would have been “more conducive to be best interest of all...”

²¹⁶ See Ademola Ogunleye *The Nigerian Prison System* (2007) 1-27.

²¹⁷ The Native Courts Ordinance, Cap 42, Native Courts Proclamation No. 25 of 1901.

²¹⁸ Alan Milner *The Nigerian Penal System* (1972) 22.

²¹⁹ AG Karibi-Whyte *Criminal Policy: Modern and Traditional Trends* (1988) 45.

²²⁰ Ibid.

²²¹ Cyprian O Okwonkwo & Michael E Naish *Criminal Law in Nigeria (Excluding the North)* (1964) 3.

3.4.2 Developing Nigeria's Criminal Law under British Rule

The replacement of customary criminal law was gradual. Attempts to introduce an English-based criminal code did not succeed until 1904 when Ordinance No. 10 was enacted for Northern Nigeria. The Ordinance was substantially modelled after the Queensland Code, which drew heavily on a number of other codes, including the English Draft Code of Indictable Offences of 1879.²²² Efforts to legislate a similar code for Southern Nigeria remained abortive until 1914 when the Northern and Southern Protectorates of Nigeria were amalgamated into a single entity – the Colony and Protectorate of Nigeria. The Criminal Code of Northern Nigeria was then re-enacted as the Criminal Code Ordinance No. 15 of 1916 (the 1916 Code). It applied to the entire country and was different from the original code in just a few insignificant respects.²²³

With the 1916 Code, the process of replacing customary criminal law neared completion.²²⁴ Although the Code diverged from common law positions in some respects in ‘order to adapt it to local conditions and the juridical sentiments of the people’,²²⁵ it still drew upon the English common law of crimes. And while it retained some degree of recognition for traditional criminal justice, general discontent arose over its concepts and institutions, which native populations found to be incomprehensible. Other criticisms of the code include its inelegant phraseology, its unorthodox classification and arrangement of different genres of crime,²²⁶ and the marginal recognition it accorded native institutions of justice.²²⁷ Colonial supervision of native institutions would eventually strip them of whatever vestiges of indigeneness that was left, so that customary jurisdiction soon became products of statutory

²²² The other codes were the New York and Italian Penal Codes. The Queensland code was clearly intended for European countries. The English Draft Code was an attempt at codifying the English Common Law of crimes, but it did not pass in the British Parliament due to ingrained English aversion to the codification of the common law.

²²³ Karibi-Whyte *History and Sources of Nigerian Criminal Law* (1993) 68-83.

²²⁴ For an account of the debates leading up to the adoption of the code, see FH Morris ‘How Nigeria got its criminal code’ (1970) Vol. 14 No 3 *Journal of African Law* 137-154.

²²⁵ T Olawale Elias *Groundwork of Nigerian law* (1954) 173.

²²⁶ Ibid at 173; Elias provided examples. On classification, he observed that ‘Parties to Offences’ is dealt with under Chapter 2, while ‘Accessories After the Fact closes the code under Chapter 55; again, Punishments’ occurs under Chapter IV before ‘Criminal Responsibility’ in Chapter V, although ‘Preparations to commit offences, Conspiracy and Accessories After the Fact’ comes towards the end of the code in Chapters 53 and 54’. In relation to the subject matter of the Code, the prohibitions that Elias apparently noted as unorthodox include the retention and definition of offences like witchcraft, possession of charms, and the worship or invocation of juju. See sections 210 and 424 of the Criminal Code Act.

²²⁷ Chukwuma Ume ‘Alternative to imprisonment: community service orders in Africa’, in Viviane Saheh-Hanna (ed) *Colonial Systems of Control: Criminal Justice in Nigeria* (2007) 379-393 at 380.

creations, to be regulated, circumscribed and reviewed by the latter. Offences that were known to customary law had equivalents under the Criminal Code and were tried and punished under the code.²²⁸ These provisions made customary criminal law superfluous. In the course of time, and after colonialism particularly, a succession of Constitutions forbade punishing under any unwritten law. Since customary criminal law and its sanctions were unwritten, it became unconstitutional to enforce them.²²⁹

In Northern Nigeria, however, a version of native law would yet challenge the dominance of English criminal law. When the British arrived in the region, they found among its many nationalities a widespread ethno-linguistic group (the Hausa-Fulani) that had practiced Islamic law for not less than a century. Through the Native Courts Ordinance Act of 1934, colonial administrators classified the law as part of native law and custom.²³⁰ However, subjugating the law and authority of native courts to the supervisory control of colonial courts and officers made the Criminal Code of 1916 a touchy issue. Tensions bristled following the landmark case of *Tsofo Gubba v. Gwandu Native Authority*.²³¹ In this case, a conviction for murder was reached by the court of the Emir of Gwandu, relying on the rules of criminal procedure and evidence under Islamic law. A sentence of death was accordingly imposed. On appeal to the West African Court of Appeal, however, it was held that though the accused was rightly convicted under Islamic law, the evidence – when English rules of evidence were applied – could only sustain a conviction for manslaughter under ss 317 and 318 of the Criminal Code. Besides, the court held that the case should have been tried under statutory law, since there was a statutory equivalent to the customary law crime. Accordingly, the court quashed the murder conviction and returned a conviction for manslaughter.²³²

²²⁸ Milner (1972) op cit note 218 at 24-25.

²²⁹ See for example s 36(12) of the Constitution of the Federal Republic of Nigeria, 1999.

²³⁰ Native Courts Ordinance of 1934, Cap 142, Laws of Nigeria 1948; Philip Ostien 'Nigeria's sharia criminal procedure codes' in Pade Badru & Brigid Maa Sackey (eds) *Islam in Africa South of the Sahara: Essays in Gender Relations and Political Reform* (2013) 207-246 at 208; but see also AA Oba 'Islamic law as customary law: The changing perspective in Nigeria' (2002) Vol. 51 No. 4 *International and Comparative Law Quarterly* 817-850. Oba argued that Islamic law cannot rightly be classified as customary law, and that its classification as customary law was done by the British colonialist for administrative convenience.

²³¹ (1947) 12 W.A.C.A. 141.

²³² Access could not be had to the law report. The facts were gleaned from the following works: Phillip Ostien *Sharia implementation in Northern Nigeria 1999-2006: A sourcebook Vol. IV* (2007) 12; Muhammad Sani Umar,

The decision, which was vehemently denounced as an unacceptable curtailment of the authority of native courts, prompted demands for another code that mirrored Islamic nuances of criminal justice. The aftermath of the decision was the most vivid instance – and perhaps the only example – in which popular support for the authority of a native institution welled up into popular resistance against colonial impositions. A new Penal Code²³³ had to be adopted for Northern Nigeria to satisfy these demands.²³⁴ It was modelled after the Indian Penal Code, but it also retained influences of the English Common Law. The Indian code was itself a child of British colonization and had been successfully put into operation in multi-religious India.²³⁵ The Penal Code's Islamic leanings were nevertheless evident: for example, adultery and drunkenness in public places, which are not criminalized under the 1916 Criminal Code, are criminalized in the Penal Code. The Penal Code also permits haddi lashing, an Islamic form of corporal punishment. Thus, while it has been correctly argued that colonial influence abrogated customary criminal law, it is no less true that it did not completely obliterate the cultural dimensions to Nigeria's pluralistic criminal law. This was one example where colonial policy on criminal law gave way to penal populism, even if the outcome was limited to a handful of Islamic offences and punishment.

3.4.3 Penal reforms in Nineteenth Century Britain and British Penal Policy in the Colony of Nigeria

Of interest at this point is the degree to which penal developments in Britain impacted Nigeria. Arguably the most significant influence comes from the 1916 code, which was modelled after a code that had been substantially influenced by the 1879 English Draft Code of Indictable Offences. This fact lends itself to the supposition that nineteenth century penal attitudes or developments in Britain may have been transposed to the British Colony of Nigeria, to some degree. This thesis maintains that that was indeed the case, though the probable dimensions of

Islam and Colonialism: Intellectual responses of Muslims of Northern Nigeria, (2006) 53, see generally 40-55; see also Karibi-Whyte op cit note 214 at 45. The impact of the case is also briefly mentioned in Alan Milner 'Sentencing patterns in Nigeria' in Alan Milner (ed) *African Penal Systems* (1969) 263-291 at 265.

²³³ The Penal Code (Northern Nigeria) Federal provisions Act No. 25 of 1960'

²³⁴ Ibid.

²³⁵ Karibi-Whyte (1993) op cit note 214; EH Ofori-Amankwah *Criminal Law in the Northern States of Nigeria* (1986) 22.

the influence seems not to have been exhaustively explored in existing literature on penalty in Nigeria.

The major influences can be narrowed down to the works of Sir James Fitzjames Stephen, Lord Carnarvon, Chief Justice H.C. Gollan and the Gladstone Committee.²³⁶ Lord Carnarvon's contribution to British penal policy in the nineteenth century was discussed in section 3.2.4 above. A contemporary of his was Sir Fitzjames Stephen, the nineteenth century English jurist who attempted to codify the English common law of crimes. Although his work met considerable resistance in Britain and had to be abandoned, it had significant influence on the development of the criminal law in some of Britain's colonies. His utilitarian views about law and punishment regarded the law as a 'practical system invented and maintained for the purposes of an actually existing state of society'.²³⁷ With regards to the criminal law, the statement suggests that penalty responds to contemporary societal needs. Thus, Stephen's work on the history of criminal law in England narrates how penal ideology shifted from extreme methods to an emphasis on 'leniency' in the nineteenth century.²³⁸

Stephen's²³⁹ utilitarianism was not exceptional; he identified a mutual (though not completely symmetrical) relationship of 'extensive importance' between the criminal law and morality, noting examples of crimes that emphasise the coincidences between both. He argued that these coincidences are not isolated notions of right and wrong, as they reflect a universal conscience. To deny the moral rejection of such crimes would equal denying something intrinsically human. For such offences therefore, punishment fulfils a denunciatory purpose, or it conveys public indignation. These are functions that are consistent with retributivist thinking, but they are implicitly utilitarian as well, as punishment is used here to assuage moral indignation. Thus, Stephen's assertion of a connection between criminal law, punishment and the expression of moral indignation straddled the boundaries between utilitarianism and retributivism. He argued that law and morals reinforce one another and that legal punishment expresses, solemnizes, ratifies and justifies the hatred that crime excites.

²³⁶ See Morris (1970) op cit note 224. Morris mentions the works of Gollan CJ and Sir Stephen in particular.

²³⁷ KJM Smith *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988) 55.

²³⁸ See James Fitzjames Stephen *A History of the Criminal Law of England, Vol. II* (1883) Chapter XVII.

²³⁹ KJM Smith op cit note 237.

In Stephen's²⁴⁰ views also, hatred of the criminal is a natural, ingrained human sentiment that finds healthy gratification in the 'public provisions of means for expressing it'. He was therefore dismissive of utilitarian arguments that denunciatory punishments express sheer vengefulness.²⁴¹ He also did not completely consort with the methods that were promoted by the penal thinkers of his time, who emphasized less use for pain and greater maximization of treatment-focused punishment. Official penal policy in Britain was obviously less inclined to liberalizing punishment at the time and Stephen appeared to have had considerable influence in shaping the policy. He was at odds with the popular thinking of his time and did not entertain doubts about recommending punishments that would give the offender as much pain and loss as he intended for his victim.²⁴²

When Britain annexed and made Lagos a colony in 1861,²⁴³ Stephen and Carnarvon echoed official penal policy in Britain. Stephen it was, who with three other British jurists (including Blackburn) attempted to codify English criminal law. The resultant English Draft Code of 1879 was essentially a statement of Stephen's opinions regarding the position of the law. Given Stephen's views, the code leaned heavily towards punitiveness, and though the code failed to pass in Britain, it became the model for Queensland's Criminal Code, which in turn became the model for Nigeria's first criminal code.²⁴⁴ However, and quite unlike South Africa, the rationality that underpinned the goal of adopting a criminal code for Nigeria was not tempered by any desire to export the relatively modest changes that were beginning to give punishment a

²⁴⁰ Stephen op cit note 238 at 80-82.

²⁴¹ Ibid at 82. Stephen argued as follows: '[Hatred for the criminal is] ... deeply rooted in human nature. No doubt, they are peculiarly liable to abuse ... but unqualified denunciations of them are as ill-judged as unqualified denunciations of sexual passions. The form in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice is the most emphatic of such forms, stand to one set of passions in the same relation in which marriage stands to the other.'

²⁴² Stephen op cit note 238 at 91-92.

²⁴³ For an account of the annexation, see Laszlo Máthé-Shirés 'Lagos Colony and Oil Rivers Protectorate' in Kevin Shillington (ed) *Encyclopedia of African History Volumes 1-3* (2009) 91-92; Alfred Moloney 'Notes on Yoruba and the Colony and Protectorate of Lagos, West Africa' (October 1890) Vol. 12 No. 10 *Proceedings of the Royal Geographical Society and Monthly Record of Geography*, New Monthly Series 596-614 at 598; Hakeem Tijani 'The "new" Lagos Town Council and urban administration, 1950-1953' in Toyin Falola & Steven J Salm *Nigerian Cities* (2004) 255-269 at 255.

²⁴⁴ Ogunleye op cit note 216 at 16. The author notes that the Queensland Code contained many provisions that were not found Sir Stephen's code, but which were considered by the drafter to be correct statements of the common law.

more humane face in Britain. Colonial officials felt they were too complex for Nigeria.²⁴⁵ The task of drafting a suitable code that was free of these complexities fell to Chief Justice HC Gollan, who set about preparing a code that would be easily utilized by colonial officers that were not legally trained. The outcome was the 1904 Criminal Code.

Given the origins of the Queensland code, it is appropriate to suggest that Nigeria's first criminal code significantly reflected Stephen's punitive ideas. No subsequent attempts were made to bring the codes 'in line with the changes in substantive law and in penal thought that have occurred in England ...',²⁴⁶ or to commit to the humanitarian ideals that were redefining punishment in Britain.²⁴⁷ This explains why Nigeria's penal policy is devoid of influences that favoured humanitarian responses to crime at this time in British history.²⁴⁸ It left the development of sentencing jurisprudence in Nigeria mostly insipid: whatever may be said of the subsisting jurisprudence is reminiscent of dated penal traditions that are ill-suited to the needs of crime control in modern Nigeria.

It could not have been otherwise. In Adeyemi's²⁴⁹ views, Britain's colonial policy in Nigeria was motivated by expediency. Consequently, it did not need to justify its criminalisation of any conduct or omission beyond whatever was necessary to advance the colonial interest. This was unfortunate, as it led to excessive criminalisation. According to Adeyemi²⁵⁰ also, criminalising conduct ordinarily ought to be founded on sound justification. This would avoid arbitrariness in how crimes were defined and ensure that acts or omissions that are criminalised stayed within limits of the society's tolerance levels for laws that curtail individual freedoms. An attempt to find that basis must follow guiding principles that must be evaluated in the context of each society. These principles require that penal statutes only prohibit acts or omissions that are clearly ethically reprehensible. Also, the sanction must be effective. It must be capable of

²⁴⁵ Morris (1970) op cit note 224 at 139-140.

²⁴⁶ Simon Coldham 'Criminal justice policies in Commonwealth West Africa: trends and prospects' (2000) Vol. 44 No. 2 *Journal of African Law* 218-238 at 219-220.

²⁴⁷ Ibid.

²⁴⁸ Ibid; see also Richard Bowd 'Status quo or traditional resurgence: what is best for Africa's criminal justice systems?' in *The Theory and Practice of Criminal Justice in Africa* (June 2009) Institute for Security Studies, Monograph 161, 35-55, available at <http://www.iss.co.za/uploads/M161C3.PDF>.

²⁴⁹ AA Adeyemi 'The criminal process as a selection instrument for the administration of criminal justice' in Adedokun A Adeyemi (ed) *Nigerian Criminal Process* (1977) 26-71 at 35.

²⁵⁰ Ibid.

detering those who are likely to commit the offence. Lastly, the offender must profit from the prescribed punishment.²⁵¹ By putting forward these principles, Adeyemi offered a synopsis of the utilitarian and retributive considerations that should shape policies on crime and punishment. He argued that the failure of colonial penal policies to comply with the principles left Nigeria's criminal justice system overburdened and irrational:

[O]ur criminal law encompasses a baffling range of offences which cannot possibly be coordinated on the basis of the above-stated combined guidelines. Thus, the criminal law will be seen to cover broadly offences against the interest of the rules of the country. ... If one subjects [the] array of offences to the guiding principles enumerated above, one will discover that our criminal law contains many offences that should not be offences, whilst it omits some which should.²⁵²

In sum, and as Adeyemi rightly observed, colonial penal policy excessively resorted to criminalisation as a measure of social control:

[There are] fundamental defects in our criminal law. The 'a posteori' (sic) approach, besides its lack of rationalisation in criminalisation policy, has always relied upon and employed the criminal law as the omnibus and omnipotent machinery for rectifying all sorts of ills befalling the society or its members, with a near frightening reckless dedication and frightening faith. ... The dedication has led to an over-heating of the criminal process because of its resultant over-criminalisation.²⁵³

3.4.4 Criminalisation and the Nigerian Prison System

Central to the policy of criminalisation was the prison system. The first English-style prison was introduced to the Lagos Colony in 1862.²⁵⁴ It was administered on much the same practices that obtained in British prisons at the time and on the same philosophy of severity conceived by nineteenth century British jurists and penal administrators. In a well-researched history of the Nigerian prison system, Ogunleye²⁵⁵ wrote about striking parallels in British and colonial prisons; the bruising severity of English prisons which eventually came under severe public censure in 1895 were the same practices that were recommended for adoption in the Colony of

²⁵¹ Ibid at 35-36. Although Adeyemi acknowledged that the principles may be controversial, he held the view nonetheless that they collectively provide a 'necessary criteria for justifying the creation of a crime'.

²⁵² Ibid at 36-37.

²⁵³ Ibid at 38-39.

²⁵⁴ The reliance on prison sentences for a vast majority of crimes in the criminal codes of Nigeria further highlights the centrality of the prison system to colonial penal policy.

²⁵⁵ Ogunleye op cit note 216 at 34-37.

Lagos in 1865. The Colonial Secretary, Lord Glanville believed the colonies needed to share in the benefits of the ‘experiment’ that British prisons represented.²⁵⁶

However, Lord Glanville’s eagerness was tempered to some degree by colonial administrators who were reluctant to import the cruel methods of the English penal system, lock, stock and barrel. They preferred to utilize penal labour in a less punitive and remunerative manner, and for public projects. Thus, the insistence of the Colonial Office in Britain on the implementation of a relentlessly punitive regime petered in time, in deference to how colonial administrators in the colony interpreted prevailing local attitudes and conditions of punishment. Even then, the Colonial Office did not yield in its insistence on hard fare, hard labour and solitary confinement. It ensured that the Prisons Ordinance²⁵⁷ adopted for the Colony of Lagos in 1876 carefully followed the English Prison Act of 1865.²⁵⁸

What may have been a turning point for the Colony’s penal policy came with the report of the Gladstone Committee, which examined the need for reforms in the English penal system. In 1895, the Committee issued a report that endorsed deterrence and reformation as goals to be sought in punishment, in place of unproductive penal labour. According to Ogunleye,²⁵⁹ the Committee’s report had direct influence on Nigeria’s system of punishment. It moved the system away from its focus on ‘harsh punishments’ to ‘rewards’. Under the rewards system, marks were awarded for industry and good behaviour, and sentence remission of up to a quarter of the

²⁵⁶ Ibid at 36; Ogunleye writes the following regarding the transplantation:

The English prison system was run along [the lines of “hard labour, hard fare (i.e., reduced diet) and a hard bed”] from 1865 until the ... [methods] led to an outcry in 1895. ... It was this system which advocated that deterrence could be produced by solitary confinement accompanied by punitive, non-productive and useless labour, and prolonged suffering, that was recommended to Lagos for adoption in 1865. No doubt, the recommendation was administratively and economically sensible at the time, as it was logical that the results of the extensive and expensive experience obtained in England should not be lost altogether to the colonies. According to Lord Granville (then Colonial Secretary), the colonies must be able to “share the benefit to be derived from the experiment. ... The system recommended by the Colonial Secretary rested on three major cornerstones: the separate system, rigorous, unproductive labour; and a very strict deregulation of diet. Rigorous penal labour was to be enforced and industrial and constructive employment introduced only after a prisoner had first undergone the calculated useless labour. As it was the firm belief that the “low animal natures of the criminal class ... render plain the value of diet as one form of penal correction, the diet was to be so minimal as only to be able to sustain the prisoner without killing him.

²⁵⁷ No 9 of 1876.

²⁵⁸ The Prison Act, 1865 (28 & 29 Vict. C 126). The Ordinance ‘rested on the same foundation stones [of] separate system, penal labour and low diet’. See Ogunleye op cit note 216 at 37-38 & 43.

²⁵⁹ Ogunleye op cit note 216 at 51.

sentence could be earned.²⁶⁰ One feature that stood out is the system's inclusion of the progressive stages of punishment principle, which Lord Carnarvon adumbrated.²⁶¹ As Britain consolidated rule over more territories in Nigeria, more western-style prisons were established.²⁶² However, over-criminalisation and the frequent use of prison sentences ensured that over time, the prisons came under severe pressure.

3.4.5 Punishment, the Nigerian Constitution and Penal Statutes

Since Nigeria became a constitutional democracy in 1960, it has had four Constitutions: the Constitution of the Federation of Nigeria 1960, the Constitution of the Federal Republic of Nigeria 1963, the Constitution of the Federal Republic of Nigeria 1979 and lastly, the Constitution of the Federal Republic of Nigeria 1999.²⁶³ The 1999 Constitution is currently in force.

It is useful to see how these Constitutions entrench standards that impose constraints on the power to punish in order to understand changes that have occurred. The first standard setting provision enshrines the principle of legality by prohibiting prosecutions or convictions for crimes that are not defined and penalties therefor not provided in written law.²⁶⁴ It is this prohibition that makes customary criminal law unconstitutional.²⁶⁵ More about the principle will be discussed in chapter four.²⁶⁶ The Constitutions also prohibit retroactive criminal statutes and the award of a

²⁶⁰ Ibid at 51-52.

²⁶¹ Ibid, see generally 30-53. The marks system was enacted and spelt out in the Prisons Ordinance (Amendment) Ordinance 1897. See also Morris op cit note 224 at 138.

²⁶² National Open University of Nigeria 'Course Code: CSS 351 - Prisons and correction of offenders in Nigeria' Module 1 Unit 1 (Undated) page 2-3, available at http://www.nou.edu.ng/NOUN_OCL/pdf/pdf2/CSS351.pdf, accessed 26 August 2014.

²⁶³ Except for the numbering, the content of the provisions of chapter three of the 1960 constitution correspond to the content of the provisions of chapter three of the 1963 constitution. Similarly, the content of the provisions of chapter four of the 1979 constitution correspond with the content of the provisions of chapter 4 of the 1999 constitution. Provisions relating to punishment are contained in these chapters.

²⁶⁴ Section 21(10) of 1960 Constitution; s 22(10) of 1963 Constitution; s 33(12) of 1979 Constitution; and s 36(12) of 1999 Constitution.

²⁶⁵ The exception to this is Islamic criminal law. Although it is statutorily classified as native law and custom, it escapes the prohibition because it is written law. See TO Elias *Nigeria: The Development of its Laws and Constitution* (1967) 381-382. However, until recent enactment of sharia penal codes by some states in Northern Nigeria, the Penal Code of northern Nigeria was in force in the region. See also Oba op cit note 230.

²⁶⁶ See chapter 4 sections 2.1a and 4.1.

penalty that is heavier than the penalty that was in force when the alleged crime was perpetrated.²⁶⁷ Penal laws and sentencing decisions must conform to these standards. Further, no person may be deprived of his or her liberty except in furtherance of a judicial order.²⁶⁸ The intentional deprivation of the right to life is constitutional when it is done in execution of a sentence of death pronounced by a competent court against an offender who has been found guilty of a criminal offence.²⁶⁹

Presumably, punishments ought not to infringe constitutional guarantees for human dignity. However, a literal and purposeful interpretation of the human dignity clauses in the 1960 and 1963 Constitutions suggests that stronger protections for human dignity were inserted in those Constitutions than can be found in the 1979 and 1999 Constitutions. Section 18(1) of the 1960 Constitution and s 19(1) of the 1963 Constitution are *in pari materia* and provide that ‘no person shall be subjected to torture or to inhuman or degrading punishment or other treatment’. The sections provide for ‘treatment’ and for ‘punishment’. On the other hand, s 34(1)(a) of the 1999 Constitution (which is also *in pari materia* with s 31(1)(a) of the 1979 Constitution) provides that ‘every individual is entitled to respect for the dignity of his person, and accordingly no person shall be subjected to torture or to inhuman and degrading treatment’. The latter Constitutions omit ‘punishment’ from the phraseology of their human dignity provision. There does not seem to be a plausible explanation for this omission. What may be apparent, however, is that the latter Constitutions vaporise an essential component of the constitutional guarantee for human dignity, by failing to expressly prohibit punishments that offend human dignity and violate rights. How this is so, and its probable consequences will be discussed in chapter four.²⁷⁰

To some degree, however, what is lacking in the 1999 Constitution may have been supplied by international or regional human rights instruments that bind Nigeria. A pertinent example is the African Charter on Human and Peoples’ Rights, 1981, which Nigeria

²⁶⁷ Section 22(7) of 1960 Constitution, s 22(7) of 1963 Constitution, s 33(8) of the 1979 Constitution and s 36(8) of the 1999 Constitution.

²⁶⁸ Section 20(1)(a) of the 1960 Constitution; s 21(10)(a) of the 1963 Constitution; s 32(1)(a) of the 1979 Constitution; and s 35(1)(a) of the 1999 Constitution.

²⁶⁹ Section 17(1) of the 1960 Constitution; s 18(1) of the 1963 Constitution; s 30(1) of the 1979 Constitution; and s 33(1) of the 1999 Constitution.

²⁷⁰ See chapter 4 section 4.1.

domesticated by means of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.²⁷¹ The Act incorporates the Charter as a whole. Article 5 of the incorporated Charter states:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

However, the manner in which this provision will regulate punishment in Nigeria has yet to be judicially tested. Nevertheless, its domestication supplies an important human rights principle that could moderate penal severity in Nigeria.²⁷²

The legality principles enshrined in the 1999 Constitution is the closest that the Constitution came to regulating penal legislation. However, as long as a piece of legislation is not caught by this non-retroactive principle, Nigerian courts have assumed the appropriateness thereof. Thus, the penalties prescribed by colonial era criminal codes,²⁷³ the main penal legislation in Nigeria have been consistently enforced. Likewise, other criminal statutes that create and prescribe penalties for offences, including those created under military administrations, such as the Robbery and Firearms Act. Two predicaments emerge from this framework. First, there is a focus on severity and excessive criminalisation of conduct in these penal statutes, which could easily predispose judicial sentences to being excessive. Secondly, and as will be further discussed in chapter 4, the statutes allow judges to exercise extensive sentencing discretion in most cases, or no discretion at all.²⁷⁴

No account of penal developments in post-independence Nigeria will be complete without considering how military rule impacted crime and punishment. It is trite that military incursions in governance stultify development. The repercussion extends to penal policy. To start with, military administrations repeatedly suspended the Constitution in order to assume legislative

²⁷¹ No 2 of 1983, Chapter A9, Laws of the Federation of Nigeria, 2004. Another example is the International Covenant on Civil and Political Rights, 1966. Nigeria became bound by the Convention when it acceded to it on 29 July 1993. According to article 7 of the Convention, '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...' However, the Convention cannot be enforced in national courts because it has not been domesticated.

²⁷² See discussion in chapter 4 section 4.3.

²⁷³ Coldham op cit note 246 at 218.

²⁷⁴ See chapter 4 section 4.4 below.

powers, and proceeded to issue repressive decrees that infringed rights, prescribed stiff penalties and ousted the jurisdiction of courts to adjudicate the constitutionality of military decrees or redress the violation of rights. Conceivably, it may be that these exclusionary measures provide the context for evaluating the omission of ‘inhuman and degrading punishment’ from the human dignity clause in the 1979 and 1999 Constitution, since both Constitutions were adopted by military administrations. Secondly, successive military regimes took little interest in penal reforms,²⁷⁵ and such policy interventions that occurred tended to be ad hoc and political (directed against challenges to the legitimacy of military administrations), or to target crimes that threatened serious public interests. Three such interventions aimed to regulate judicial discretion, but not in a constructive way. First, mandatory sentences were adopted which withheld discretion over the type and severity of punishments that could be imposed for specific offences. The second intervention allowed discretion within a range of minimum to maximum sentences. The third intervention is called judicial direction; it provided policy guidelines for specific cases and allowed sentencers to digress whenever justice demanded.²⁷⁶ However, these measures did not enhance consistency in penal policy. In fact, they complicated sentencing inconsistencies.²⁷⁷ Since Nigeria’s transition to civil rule in 1999, little has been done to change this paradigm.

On the whole, various criminal statutes in Nigeria give courts significant discretion. The exception to this pertains to mandatory penalties. Beyond mandatory penalties however, courts have a range of criminal sanctions to choose from. In practice though, they have preferred prison

²⁷⁵There was a 4-year intermission of civil rule from 1979-83, and another 3-month intermission in 1993. Until the political transition to civil rule in 1999, Nigeria had more of military than civil rule.

²⁷⁶Judicial directions were not restrictions as such; they were a prescription of sentencing policies that courts were expected to follow in specified cases, and from which they may digress for compelling reasons. An example of this is found in the Indian Hemp Decree 1966. S.10 prescribes the caning of male offenders who are under nineteen unless it appears to the court that there are strong reasons why it should not do so in a particular case. S. 11 contains a provision that stresses rehabilitation and requires young offenders under seventeen to be dealt with by probation, committal to an approved school, or by taking a security for good behavior, unless there are strong reasons why the court should not do so in a particular case. See Milner (1972) op cit note 218.

²⁷⁷Generally, military administration hampered the development of Nigeria’s penal system. Many of their decrees lacked originality because they were randomly adopted from foreign penal systems, in response to local crime problems. Worse still, they were neither adapted to the social context of crime and punishment in Nigeria, nor cured of the problems that were inherent in their original form. Thus, their incorporation in Nigerian law only added to the problems on ground. Milner op cit note 213; see also Coldham op cit note 246.

sentences.²⁷⁸ Different reasons have been offered for this. For instance, it has been argued that Nigerian judges were trained in the conservative traditions of English penal jurisprudence. Thus, their sentencing decisions, especially in early post-independence years, were practically similar to those passed in England.²⁷⁹ This was to be expected because Nigerian courts relied on English decisions for guidance.²⁸⁰ The second reason is that there is no supporting infrastructure to implement non-custodial punishment.²⁸¹ Yet another factor that could have goaded the courts to impose prison sentences is the fact that imprisonment is the most prescribed punishment in the statute books. For these reasons, imprisonment became the first line measure of social control, rather than a last resort reserved for very serious cases.

3.4.6 Social Trends and Sentencing Policy and Legislation in Nigeria.

When one pages through the history of modern criminal law in Nigeria, what becomes salient is the significant impact that English criminal law continues to have over the country. In pre-independent Nigeria, English criminal law framed crime and sentencing law and practice. Colonial policy at the time did not encourage indigenous involvement in legislating criminal law. Probably the closest that crime making policy came to being influenced by popular opinion was when Muslims in Northern Nigeria demanded a separate penal code that contained aspects of Islamic law in the wake of the *Tsofo Gubba* case. That demand ignited a campaign that culminated in the adoption of the Penal Code of Northern Nigeria 1960, on the eve of independence that same year.²⁸² Since independence, however, colonial era penal codes have applied in most cases, supplemented by a number of offence specific statutory legislation. Overall, no significant changes to the colonial era criminal codes occurred, for the large part because there has not been sustained engagement with penal reforms as pointed out in chapter

²⁷⁸ Ayo Atsenuwa 'Criminal Justice Reforms in Areas of Bail, Remand and Sentencing' in JC Otteh (ed) *Reforming for Justice: A Review of Justice Sector Reforms in Nigeria 1999-2007* (2007) 75-124 at 83-84.

²⁷⁹ Milner (1972) note 218 at 48 – 50; see also Omoniyi Adewoye, *The judicial system in southern Nigeria , 1854 to 1954: Law and justice in a dependency* (1978) 111.

²⁸⁰ Nigerian courts relied on English decisions as binding precedents until Nigeria's 1963 Republican Constitution made the Supreme Court the last court of resort, thereby ending appeals to the Privy Council. Since then English decisions have had persuasive authority. See Okwonkwo and Naish op cit note 216 at 3.

²⁸¹ Atsenuwa op cit note 278.

²⁸² See discussion on the *Tsofo Gubba* case in section 3.4.2 above.

one of the thesis. Twenty-nine years of military dictatorship also stalled reforms in the criminal justice sector.²⁸³

It is important to point out that the lack of attention to penal reforms in Nigeria stymied discourse on crime and punishment, depriving the country of the kind of ideological or political contestations that have shaped penal policy in places like Britain and South Africa. One finds that in these two countries, discourses about crime and punishment were informed by dominant social or political cultures, resulting in responses that sometimes wove the crime question into welfare programmes designed to redress the root causes of crime or strengthen social control. Unfortunately, no corresponding levels of contestations or crime policy responses can be found in Nigeria. Courts also ruled themselves out of jurisdiction to impeach statutory penalties that prescribed excessive penalties, which suggests that the judicial policy on the subject is beholden to whatever the legislature determines to be the punishment for a crime.²⁸⁴

In what could have changed the paradigm, in the early 2000s, 12 states in northern Nigeria adopted sharia criminal codes.²⁸⁵ It has been asserted that the aims of adopting the codes were political, to fulfil campaign promises or score political points.²⁸⁶ The preparation of the codes was hasty and the final outcome was flawed. There were no consultations in their preparation, meaning the public voice was shut out of the process of their enactment. Nevertheless, the codes were widely applauded by Muslim adherents in the states that adopted them, but no sooner had the euphoria settled than the implementation of the codes sprang dilemmas. Among the first recipients of sharia criminal justice was Buba Kare Garki, whose hand was amputated following conviction by a sharia court for the theft of a cow.²⁸⁷ There were other convictions and sentence executions, but a particularly notorious one involved Safiya Hussaini,²⁸⁸ who, in 2002, was sentenced to death by stoning for committing adultery. Her fellow adulterer was never subjected to prosecution, which turned the spotlight on the discriminatory

²⁸³ See discussion on impact of military rule on crime policy making in Nigeria in section 3.4.5

²⁸⁴ See discussion in chapter 4 sections 4.

²⁸⁵ Rudolph Peters *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (2005) 169-171.

²⁸⁶ Human Rights Watch *Political Shari'a? Human Rights and Islamic Law in Northern Nigeria* (2004) Vol. 16 No. 9(A) 37-38.

²⁸⁷ Ibid.

²⁸⁸ Ibid at 63-65.

dimensions of sharia justice. Following strident criticisms from national and international human rights groups and media, the federal government stepped in to allay fears that the execution would be carried out. The verdict was eventually reversed on appeal²⁸⁹ but a second woman, Amina Lawal, soon got convicted of adultery. Amina Lawal also received considerable international support, and her conviction was eventually overruled on appeal.²⁹⁰

Although the convictions were repealed on technical grounds, different social forces, ranging from religious to feminist voices,²⁹¹ the federal government, human rights groups and the media that converged to contest the appropriateness of punishment under the sharia code apparently informed eventual outcomes. However, the contestations were inevitably limited, as the terms of the debate that raged over the appropriateness of the trials and convictions skirted the constitutionality of the sharia criminal law system in Nigeria, a question that remains unresolved today. Thus, the issues that revolved around Safiya and Amina's sentences – even in the appeals that emerged – were contested outside questions about the constitutionality of the sharia criminal code, and by necessary extension, outside conventional crime policy making in Nigeria. There remains a sensitivity around questions of religion in Nigeria that restrains critical conversations around sharia criminal law. It is a religious code as it were, applicable to Moslem adherents who subscribed to it in a section of the country. Unfortunately, the passion that Safiya and Amina's cases ignited over the sentences imposed has not been witnessed in the larger sphere of sentencing under conventional criminal law in Nigeria, which evolved under common law and statutory law. While one or two states have embarked on reforms, Coldham's observation that a vacuum exists in studies about sentencing under Nigerian criminal law continues to hold true. Sentencing as an area of criminal justice administration has yet to witness a convergence of interests significant enough to mobilise robust support for research.

²⁸⁹ BBC News 'Sharia Court frees woman' March 25 2002 available at <http://news.bbc.co.uk/2/hi/africa/1891395.stm>, accessed 4 August 2015.

²⁹⁰ Somine Sengupta 'Facing death for adultery: Nigerian woman is acquitted' New York Times September 26 2003 <http://www.nytimes.com/2003/09/26/world/facing-death-for-adultery-nigerian-woman-is-acquitted.html?ref=topics>, accessed 4 August 2015.

²⁹¹ Barbara Callaway and Lucy Creevey 'Sub-Saharan Africa; in Saud Joseph and Afsana Nagmabadi (eds) *Encyclopedia of Women and Islamic Cultures: Family, Law and Politics Vol 2* (2005) 594.

There have been other opportunities for reform in the last decade or two, but these have focused on specific crimes, such as kidnapping, corrupt practices, and economic and financial crimes, as well as criminal procedure. Although the focus was not on sentencing per se, it nevertheless brought about a convergence of social and political forces that could have been harnessed to achieve sentencing reforms. Kidnappings started off in Nigeria as part of a struggle against economic and political repression in the oil rich Niger-Delta region. Most of its victims were expatriates, but the perpetrators soon found new targets in high net worth individuals, politicians and even religious figures, for whom they demanded millions in ransom. By the time a few federating states in Nigeria decided to intervene by enacting anti-kidnapping laws that prescribed the death penalty, kidnappings had mutated into a multi-billion naira criminal industry, fuelled in large part by poverty and unemployment.²⁹² The federal government (the legislature to be precise) also debated a bill that would prescribe life imprisonment for kidnap and hostage taking, but the bill never saw the light of day.²⁹³

Corruption and economic and financial crimes also became national priority crimes because they had become endemic threats to Nigeria's social, economic and political fabric. Therefore, soon after the transition to civil rule in 1999, the new administration gave attention to passing anti-corruption and anti-economic and financial crimes laws. The first legislation, the Independent Corrupt Practices and other Related Offences Act 2000, was signed into law about a year after the administration's inauguration. It prescribed sentences of two to seven years' imprisonment for corrupt practices. The second legislation is the Economic and Financial Crimes Commission (Establishment) Act, signed into law in 2002 but subsequently amended in 2004. It

²⁹² Nseabasi S Akpan 'Kidnapping in Nigeria's Niger-Delta: An exploratory study' (2010) Vol. 24 No. 1 *J Soc Sci* 33-42; Blessing EN Thom-Otuya 'Kidnapping: A challenge to Nigeria Security System' (2010) Vol. 2 No 8 *International Journal of Social Sciences* 107-116; Justice Chidi Ngwama 'Kidnaping in Nigeria: An emerging social crime and the implications for the labour market' Vol. 4 No. 1 *International Journal of Humanities and Social Science* 133-145.

²⁹³ Senate Bill 228 *A Bill for an Act to Provide Measures for the Prevention of Hostage Taking and Kidnapping in the Federal Republic of Nigeria and for Other Connected Purpose*, 6th National Assembly, Nigeria, 2008, C1217, available at <http://www.nassnig.org/document/download/1102>, accessed August 7 2015.

punishes economic and financial crimes by two to five years imprisonment, with option of fine.²⁹⁴

By adopting laws on kidnapping, corruption and economic and financial crimes, federal and state governments in Nigeria signalled they would go tough on the crimes. Or so it seemed. Salient features of crimes include the fact that the victims or perpetrators were the wealthy, who are often perceived to have enriched themselves from the public purse. However, the notion that the laws were enacted in the public interest has been challenged.²⁹⁵ The social dimensions of the crimes, straddling as it were the class divide and wealth ownership in Nigeria, can be said to have prompted a bifurcated governmental response that probably reinforced power imbalances in the country. On one hand, it resulted in kidnapping laws that prescribed the death penalty. The real beneficiaries were the wealthy victims of kidnappers. Thus, one could construe the laws as designed to preserve Nigeria 's propertied class.²⁹⁶

On the other hand, the abovementioned laws targeted offences that were typically committed by the wealthy or politically connected. However, though the laws were widely

²⁹⁴ The ICPC Act established the Independent Corrupt Practices and Other Related Offences Commission, while the EFCC Act established the Economic and Financial Crimes Commission.

²⁹⁵ For the background of the Act, see Independent Corrupt Practices and Other Related Offences Commission 'Legislative background' available at www.icpc.gov.ng/legislative-background/, accessed August 6 2015.

²⁹⁶ There was pervasive relief in the affected states upon the passage of the laws, that government had at last taken steps against a crime the imposed widespread insecurity on society. However, the real beneficiaries were the wealthy. Those that could have been punished under the law are typically poor and unemployed individuals who took to criminal ways. At any rate, the laws failed to deliver on their promise. A recently published empirical study of the crime in Uyo in South-South Nigeria suggests that the implementation of the law (or better still, its non-implementation) was at variance with public expectations. Although the study was focused on Uyo metropolis, it extrapolated the findings, and blamed the prevalence of the crime in Nigeria on the laxity of government response. See John Domingo Inyang and Ubong Evans Abraham 'The social problem of kidnapping and its implications on the socio-economic development of Nigeria: A study of Uyo Metropolis (2013) Vol. 4 No. 6 *Mediterranean Journal of Social Sciences* 531-544. Somehow, states have not followed through with their commitment to end the crime, with the result that as at July 2014, there were 'no meaningful convictions' under the laws, even though in 2013, 'Nigeria recorded one of the highest rates of kidnappings in the world'. See Canada: Immigration and Refugee Board of Canada *Nigeria: Kidnapping for ransom, including frequency, profile of victims and kidnappers; response by authorities (2013-July 2014)* (2014), NGA104917.E, available at <http://www.refworld.org/docid/546dc1724.html>. The publication notes that kidnappings have extended to other parts of Nigeria, especially in the north east, where a notoriously violent jihadist sect called Boko Haram has been carrying kidnappings. The political class found an easier way out by beefing up private security arrangements, again at public expense. See Reuters 'Violence, theft and kidnappings spur TAC armoured vehicle growth in Nigeria' *Press Release* February 28 2009, available at <http://www.reuters.com/article/2009/02/18/idUS208887+18-Feb-2009+BW20090218>, Bukola Alabi 'Nigeria is the highest importer of bullet proof vehicles' *The Nation* May 19 2013, available at <http://thenationonlineng.net/nigeria-is-highest-importer-of-bullet-proof-vehicles/>, accessed August 7 2015.

applauded, the process of formulating and enacting them did not include public consultations. According to Igbinovia and Edobor-Igbinovia²⁹⁷ ‘government’s desire to establish [the Independent Corrupt Practices Commission (ICPD) and the Economic and Financial Crimes Commission (EFCC)] was not fully and altogether informed or impelled by nationalistic or patriotic or altruistic flavour. In part, these agencies were created to meet the demands of the government to keep its house in order if it was to benefit from the international community.’ Writing with particular reference to the EFCC, the authors observed that its ‘establishment ... was impelled by social, political and economic expediency and imperatives. Indeed, the coming into being of the EFCC was due mainly to the pressure from the international community on Nigeria to do something ... [to avoid] losing foreign investments and financial support’.²⁹⁸ Thus, when the ICPC’s activities threatened vested political interests, Nigeria’s Senate passed bogus amendments to the Act that essentially whittled down the ICPC. Fortunately, the effort failed. The Nigerian Bar Association, the Nigerian Labour Congress, and the National Association of Nigerian Students amongst several eminent others rose up to resist the amendment. Some members of Nigeria’s House of Representatives (the lower house of the federal parliament) filed a lawsuit that challenged the amendment, and succeeded in getting it annulled.²⁹⁹

The above examples are illustrations of the extent to which the Nigerian government took the public voice into consideration on very important issues requiring penal reforms. The laws were negotiated away from public spaces that could have engendered the widest possible input and the most comprehensive penal solutions. In a rather insightful comment made in the context of Nigeria’s campaign against corruption and economic and financial crimes, Kola-Balogun³⁰⁰ wrote in 2003 that [t]here is a growing perception now in Nigeria that our laws are becoming

²⁹⁷ Patric Edobor Igbinovia and Blessing Edonot-Igbinovia *The Economic and Financial Crimes Commission on Nigeria: An Appraisal* (2014) Safari Books Ltd, Ibadan 40-41.

²⁹⁸ Ibid.

²⁹⁹ Stephen Kola-Balogun ‘The Senate Vs ICPC: Going to equity with unclean hands’ *Thisday* November 25 2002, available at <http://allafrica.com/stories/200211260124.html>, accessed August 15 2015; Stephen Kola-Balogun ‘As Senate battles ICPC, self-serving agenda unfolds?’ *Thisday* 4 March 2003, available at <http://allafrica.com/stories/200303040036.html>; Akpo Mudiaga Odje ‘Nigeria: ICPC Act, National Assembly and the Rule of Law’ *Vanguard Newspaper* June 6 2003, available at <http://allafrica.com/stories/200306060441.html>, accessed August 15 2015.

³⁰⁰ Kola-Balogun (2003) op cit note 297.

narrower, partisan and self-serving, aimed primarily at the relatively less well-off citizens while those who have influence, power and authority are treated like sacred cows.’ In other words, official responses to questions about crime and punishment have reinforced wealth ownership structures, giving little or no say to the generality of the public who, lacking the leverages that the ownership of wealth would have afforded, are unable to influence penal policy to their own advantage.

Although Kola-Balogun’s prognosis may still hold true, it is not necessarily always the case. A few notable reforms to criminal procedure have occurred or are taking place with meaningful public participation. Examples include the Administration of Criminal Justice Law 2011 adopted by Lagos State in southwest Nigeria, and the federal Administration of Criminal Justice Bill. The law and federal bill will be discussed in the next chapter. However, it is difficult to suggest that these examples represent a trend that impacts sentencing policy. Public inputs in criminal procedure reforms have met with limited success so far. For example, despite several years of civil society lobbying, the federal legislature has not yet passed the abovementioned bill. At any rate, it ought to be re-emphasised that penal laws that have been enacted in post-independent Nigeria deal mostly with defining and punishing specific crimes, such as the ones described above. In the area of sentencing, there has been no sustained efforts to address overly harsh punishments, the excessive criminalisation of behaviour, or to implement alternatives to imprisonment.

3.6 Conclusion

The experiences reviewed in this chapter suggest that penal policy, legislation and sentencing are influenced by culture, political ideology, history and socio-economic factors. This is particularly true of Britain and South Africa. Through the centuries, Britain’s approach to punishment shifted, first in response to new paradigms of property relations that instigated a brutal regime of punishments, and subsequently in response to the civilising effect of the Enlightenment, which instilled greater sensitivity about penal suffering in British society. In the late twentieth century, regional and international human rights development began to exert a greater influence on penal

policy. Comparable changes can be traced through South Africa's penal history, starting with seventeenth century colonial settlements, through post-independence years to the emergence of the apartheid state. With the termination of apartheid came an ambitiously humanitarian approach to punishment that corresponds with the political rationality of the post-apartheid state.

Nigeria presents a different spectre of engagement with penal policy. Its continued reliance – for the most part – on colonial era criminal law has stultified its penal system. The missing elements become particularly glaring when the country's sentencing law and jurisprudence are juxtaposed with penal jurisprudence in South Africa. First, there is no constitutional jurisprudence in Nigeria that offers a lucid exegesis of the ideological foundations of punishment as South African courts have done. This suggests that Nigerian courts have not idealized a constitutional principle that would provide a principled and rational basis for structuring discretion and allocating punishment. That is not to say that South Africa has achieved an effective system for structuring discretion. Her failures in this regard are discussed in the next two chapters. However, South Africa has developed a firm constitutional basis for punishment that Nigeria lacks, and which the latter can learn from. Nigeria's failure in this regard – and the omission alluded to in her Constitution's human dignity clause – deprives the penal system of a principle for moderating penal severity, resulting frequently in laws and sentencing decisions that exact extreme punishments. Just how valuable such a principle is to moderating severity is discussed in the next chapter.

Chapter 4 A Normative Framework for Sentencing

4.1 Introduction

At the heart of this research is an effort to illustrate the importance of moderating punishments through principles that ensure relative proportionality between crime and punishment. Chapter three took a step towards this goal by examining penal developments in a socio-historical and political context, tracing changes in penal attitudes and policy up to the point where England, South Africa and Nigeria undertook different levels of human rights commitment in their approaches to crime and punishment. This chapter takes the discussion further by exploring the normative sentencing framework in South Africa and Nigeria in order to understand whether and how they guarantee proportionality and some degree of protection against inhuman and degrading punishments.

In particular, this chapter examines judicial principles that have been developed or accepted as standards that regulate the choice and measure of punishment.¹ It begins a process that concludes with the next chapter, of examining how sentencers interact with the theories or purposes of punishment and illustrating key developments in South Africa's sentencing legislation and jurisprudence that Nigeria can learn from. An exchange of knowledge and

¹ Other institutions in the criminal justice system exercise discretion that impact sentencing. For example, the prosecutor's perception of the circumstances and seriousness of the crime and the harm occasioned thereby influences his choice of the criminal charges that will be filed or whether there will be a plea bargain. How he exercises discretion may also determine the type and severity of punishments that the sentencing judge may impose. See Esther Steyn, 'Plea-bargaining in South Africa: Current concerns and future prospects' (2007) 20 *S. Afr. J. Crim.* 206; Cynthia Kwei Yung Lee 'Prosecutorial discretion, substantial assistance, and the Federal Sentencing Guidelines' (1994-1995) Vol. 42 *UCLA L. Rev.* 105 at 148-157; Elizabeth A Parsons 'Shifting the balance of power: Prosecutorial discretion under the Federal Sentencing Guidelines' (1994) Vol. 21 No. 1 *Valparaiso University Law Review* 414-473. The parole board also exercises discretion that impact the actual sentence served. Whether the prisoner is released on parole, or sentenced to correctional supervision is subject to the board or the Commissioner of Correctional Services' discretion. See ss 73 and 75 of South Africa's Correctional Services Act 111 of 1998; see also JD Mujuzi 'Unpacking the law and practice relating to parole in South Africa' (2011) Vol. 14 No. 5 *PER/PELJ* 205 at 212-215. The exercise of discretion is of course subject to some guidelines. See SB Jali 'Commission of Inquiry into Alleged Incidents of Corruption, Maladministration, Violence or Intimidation into the Department of Correctional Services Appointed by the Order of the President of the Republic of South Africa in Terms of Proclamation No. 135 of 2001, as Amended', (2005) Government Printers, Pretoria Chapter 9, but see particularly, pages 481 – 499, available at http://www.pmg.org.za/files/docs/061016jalireport_0.pdf, accessed on 2 February 2013.

experience between Nigeria and South Africa is indeed possible, because sentencing in South Africa has evolved in a context of developmental challenges that are comparable to those in Nigeria. How South Africa has responded to these challenges is therefore of interest.

Accordingly, this chapter and the next will endeavour to show what Nigeria can learn from South Africa by examining the normative sentencing frameworks of both countries. The object is to illustrate some of the positive legislative and jurisprudential developments that underpin the South African framework in particular and to offer them as a model for emulation by developing countries like Nigeria, while also portraying areas that require further development.

4.2 Clarifying Terminologies

Some clarification of terminologies is useful at this juncture, in order to shed light on the sense in which they are used hereafter in this thesis. Three terminologies are relevant to this study, namely the criminal sentence, sentencing and sentencing discretion. Succinctly, a criminal sentence is a judicial order that finally resolves the criminal complaint against a convicted defendant or accused person.² It is ‘the formal legal [consequence] associated with a conviction’.³ Sentencing, on the other hand, describes the process by which courts arrive at an appropriate punishment,⁴ or the manner in which the principles of sentencing are applied to individual cases.⁵ The process can be quite complex,⁶ as it involves balancing and converting factors and disparate interests that are capable of infinite adaptations into measurable quotients. It has been described as a science, art, or intuitive process.⁷

² SS Terblanche *The Guide to Sentencing in South Africa* 2nd ed (2007) 3-5.

³ Legal Information Institute ‘Sentencing’ available at <http://www.law.cornell.edu/wex/sentencing>, accessed on 01 December 2014. There are different sentence types, such as incarceration, probation, community service, suspended sentence, fine.

⁴ Ibid at 114.

⁵ Cyprian O. Okonkwo & Michael E Naish *Criminal Law in Nigeria (Excluding the North)* (1964) 41.

⁶ *S v Ntsheno* 2010 (1) SACR 295 (GSJ).

⁷ According to a research by Mackenzie, ‘balancing’, ‘science, art, or intuition’ are words that judges use to describe sentencing. The art form describes a process by which the judge exercises discretion to fit the factors in a given sentencing process to a suitable sentence. The art form also suggests that sentencing is intuitive, because art is in itself intuitive. When sentencing as an intuitive process is contemplated, it visualises the function of a judge who engages in an ‘instinctive synthesis [or intuitive process as some prefer it] of all the various aspects involved in the punitive process’. In *Ryan v R* [2001] HCA 21 at para 89, Kirby J reiterated ‘that sentencing is ... a ... function ...’.

The third terminology deserves a little more elucidation. Sentencing discretion is judicial discretion at work during sentencing. Discretion is an important element in legal decision making. It is crucial to sentencing. Indeed, it is apposite to say that sentencing is about the exercise of judicial discretion, and descriptions that suggest that the process is an art or that it is intuitive characterise sentencing as a function in which ‘judicial discretion is both paramount and maximised’.⁸ In sentencing, the judge brings her ‘experience and intuition’⁹ to bear on the principles she applies when selecting an appropriate sentence, with an eye to balancing conflicting interests in punishment.¹⁰ Without discretion, it becomes ‘almost impossible for judges to impose a sentence that adequately reflects the myriad sentencing factors’.¹¹ This statement highlights the importance of discretion, as well as the strategic position that the sentencing judge occupies in the criminal trial process, which further reinforces the need for discretion. In her role as a trial judge, the sentencer obtains a vantage view of the conduct of the trials, the demeanour of the offender and all other information that is relevant to sentencing, all of which uniquely position her to impose the sentence. In acknowledgement of the uniqueness of this position, therefore, appellate courts generally embrace the principle that punishment is ‘pre-eminently a matter for the discretion of the trial court’.¹²

4.3 Sources of Normativity in South Africa’s Sentencing System

Sources of normativity suggest the legal basis of the standards that judges employ in sentencing. This chapter identifies two sources. The first source comprises the legislative framework, which

that involves intuition and judgment’. Describing sentencing as an art or intuitive process has its challenges, because of the inherent subjectivity of the decision making process involved, which constrains objective standards that enhance fairness and consistency. However, sentencing as a science suggests an objective process, a ‘reasoned and careful methodology’ or ‘a more systematic approach’ that potentially secures a better outcome. The research suggests that the third description seems to be less popular among Australian judges. See Geraldine Mackenzie *How Judges Sentence* (2005) 13-20.

⁸ Ibid at 41.

⁹ Ibid.

¹⁰ Ibid at 41-42. The interests include the facts of the case, the victim and the offender.

¹¹ SS Terblanche, ‘Sentencing in South Africa: Lacking in principle but delivering on justice?’ (2005) Vol. 18 *S. Afr. J. Crim. Just.* 187-202 at 193.

¹² *S v Rabie* 1975 (4) SA 855 (A) at 857 para D; accordingly, the court urged caution about eroding the sentencing judge’s discretion. It may only interfere when discretion was injudiciously and improperly exercised.

consists of constitutional and statutory provisions that set standards and prescribe penalties that courts must adhere to. The second source refers to judicial precedent. This source comprises the body of binding principles that courts have developed to aid their interpretation and application of penal provisions.

4.3.1 The Constitutional Framework: The Principle of Legality as a Normative Standard in the South African Constitution

The primary source of normativity in South Africa's constitutional period is the 1996 Constitution.¹³ The Constitution establishes important constitutional norms or standards, such as the principles of equality, legality, proportionality and protections for human dignity, which all sentencing procedure and substantive sentencing legislation must comply with.¹⁴ These norms are expressed in specific rights in the Bill of Rights. For example, s 35(3) in the Bill of Rights guarantees the right to a fair trial. Sub-paragraph (l) thereof provides that the right to a fair trial includes the right 'not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'. This constitutional provision enshrines the principle of legality – a rule of law requirement that is so fundamental to criminal law – as a component of the right to fair trial.¹⁵

As a constitutional norm, the principle of legality is predicated on the need to protect individual freedoms from the abuse of state power. Thus, it obligates the State to act within the limits of law. In criminal law, and with specific reference to punishment, the principle establishes two requirements. First, rules or statutes that create crimes and stipulate penalties must be accurately and clearly¹⁶ defined by statute, so that people can be forewarned and can

¹³ The Constitution of the Republic of South Africa, 1996. The 1996 Constitution was preceded by the 1993 Interim Constitution of the Republic of South Africa, under which two important cases, namely *S v Williams and Another* and *S v Makwanyane* were decided.

¹⁴ Dirk van Zyl Smit 'Sentencing and Punishment' in Stuart Michael Bishop & Jason Brickhill (eds) *Constitutional law of South Africa* 2 ed Revision Service 4 (2012) 49-3.

¹⁵ *Director of Public Prosecutions, Western Cape v Prins* [2012] 2 All SA 245 (SCA) at 250; see also EM Burchell & PMA Hunt, *South African Criminal Law and Procedure: Vol. 1, General Principles of Criminal Law* 2 ed (1983) 59; see also, Black's Law Dictionary, 9th ed. (2009) 977; see further Lawyers Committee for Human Rights 'What is a fair trial? A basic guide to legal standards and practice' (March 2000) available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf, accessed on August 12 2013.

¹⁶ Paulius Versekys 'Liberal construction of the composition of the Criminal Act and the maxim nullum crimen sine lege: The intersection and the solution' (2012) No 2(76) *Socialiniai Mokslai* 44-46.

adjust their conduct accordingly. The second requirement is that the process of imposing punishment must also be regulated by clearly defined legal rules.¹⁷ Punishment cannot be justified when it does not comply with these requirements.¹⁸

How the principle affects criminal law was deliberated by the Supreme Court of Appeal (SCA) in *Director of Public Prosecutions, Western Cape v. Prins and Others*¹⁹ (the *Prins* case). The pertinent questions of law in the case revolved around s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 Act 32 of 2007, which created the statutory crime of sexual assault without prescribing a penalty therefor. Neither did any other provisions of the Act provide penalties for offences created by the Act. The respondent seized upon this omission to oppose the charge, arguing that the Act's failure to prescribe penalties rendered it defective. In effect, the Act created no offences. The court of first instance agreed and, relying on the principle of legality, held that the Act's failure to prescribe penalties violated the accused person's fair trial rights. The ruling was upheld by the high court, which held, apparently also relying on the principle, that the charge disclosed no offence because the Act did not provide penalties for sexual assault.

On further appeal to the Supreme Court of Appeal the issue for determination was whether the Act was incurably defective because the legislature did not expressly specify penalties for offences set out therein.²⁰ The court interpreted the issue as revolving on whether the court had power to sentence under the Act, as is. Its response to this was straightforward. It relied on

¹⁷ Van Zyl Smit op cit note 14 at 49-4.

¹⁸CR Snyman *Criminal Law* 4 ed (2002) 39 – 41. For an account of the development, justification and application of the principle in criminal law, see Gabriel Hallevy *A Modern Treatise on the Principle of Legality in Criminal Law* (2010) 8-14; Versekys op cit note 16. There are maxims that attach to the principle. First, no court may punish a person for conduct that is not criminalized in common law or by statute, i.e., *nulla poena sine lege* ('no punishment without a law authorizing it'). Common law is judge-made, but the *ius acceptum* principle ensures that courts may only apply the law 'as received to date', meaning they cannot create new common law crimes. Second, the definition of the crime must be reasonably precise and settled (i.e., *nullum crimen sine poena* which means no crime without punishment) and the punishment therefor prescribed. A statute must unambiguously and expressly communicate intention to create an offence. Thirdly, statutory crimes must be strictly construed and may not operate retrospectively. Neither can the punishment operate retrospectively. Where the intention is to create an offence but no punishment is prescribed, the court may use its discretion. Burchell & Hunt op cit note 15 at 59-63; Jonathan Burchell, *South African Criminal Law and Procedure. Volume I, General Principles of Criminal Law* 4th ed. (2011) p. 34-5; Black's Law Dictionary op cit note 15 at 977 & 1173; Elizabeth A. Martin (ed.) *A Concise Dictionary of Law* 2 ed (1990) 277.

¹⁹ Supra note 15.

²⁰ Ibid at 248.

judicial precedent that established – in line with the principle of legality – that ‘the nature and range of any punishment ... has to be founded in the common law or statute...’.²¹ Accordingly, a court may only refrain from punishing a particular crime, when the penalty therefor cannot be founded in common law or statute.²² Thus, the relevant question for consideration in *Prins* turned on whether the Act unequivocally conveyed a legislative intention to criminalize the prohibited acts. Where that intention can be read into the Act, the offences created thereby are consistent with the principle of legality. This is so even where no penalties are provided by the Act.²³ In such cases, the court may resort to its sentencing discretion under s 276(1) of the Criminal Procedure Act 51 of 1977, without violating the defendant’s constitutional rights to a fair trial.²⁴

Proceeding from the above reasoning, the court found that ss 2 and 5(1) of the Act expressly conveyed the legislature’s intention to create the statutory offence of sexual assault.²⁵ Accordingly, in the light of the 2007 Act’s omission to prescribe penalties, the court’s power to punish offenders reverts to and is limited to the types of punishments provided in s 276(1) of the Criminal Procedure Act. This is the case for statutory and common law offences. Without s 276(1), however, courts are divested of power to punish common law crimes, or punish statutory crimes for which there are no specific penalty provisions.²⁶ A corollary of this finding is that the principle of legality underlies 276(1),²⁷ and prevents courts from inventing new punishments or crimes.²⁸

²¹ Ibid at 251.

²² Ibid; an additional ground on which a court may refrain from punishing, as the court held, is where the penalty is beyond the jurisdiction of the court.

²³ Ibid at 251-253.

²⁴ Ibid at 263.

²⁵ Ibid at 255-257.

²⁶ Ibid at 264.

²⁷ Ibid at 260-262.

²⁸ *S v Malgas* 2001 (1) SACR 469 (SCA) at 472 paras E-G; see s 276(2)(a) of the 1997 Act. In *State v Franco Johannes Nel* unreported case no D 418/10 (16 September 2011) at paras 8 & 9, the high court held the proviso to s 276(3)(b) ensures that penalties that are prescribed under s 276(1)(h) & (i) are not imposed where (mandatory) minimum sentences ought to apply.

4.3.2 The Bill of Rights and Punishment

The Bill of Rights has other far reaching consequences for sentencing law.²⁹ To borrow from McIntosh's analysis on the prohibition of cruel, inhuman and degrading punishments in West Indian Constitutions, the Bill of rights is

a document of principle that lays down general, comprehensive moral standards of justice, liberty and political decency regarding ways in which the government may, or may not, treat its citizens. These fundamental rights give expression to our best conception of the human person. Taken together, they define a political ideal: they give expression to a constitutional vision of a just society; a vision that locates the individual person as the moral centre of that society; and one that enjoins the government to treat all citizens with dignity, respect and concern.³⁰

Based on the foregoing, it may be said that questions about whether punishment is just are questions about whether punishment 'respects the value of human dignity, is appropriate to the nature of the crime, and is not imposed principally for the purpose of achieving some social goal or policy'.³¹ These questions suggest something rather trite; in penology, issues about an offender's dignity and proportionate punishments are intertwined. If punishments are to be just within a Bill of Rights scheme, lawmakers must pass criminal statutes that comply with guaranteed constitutional rights, and courts must interpret the statutes in a manner that ensures that punishments do not limit rights any more than is necessary. Essentially then, the Bill of Rights legitimises the normative framework for regulating punishment. How South African courts ought to regard the Bill of Rights was described in the following remarks by Langa J in *S v Makwanyane*:³²

A framework has been created in which a new culture must take root and develop ... Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. ... A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered ... The ethos of the new culture ... describes the Constitution as a 'bridge' between the past and the future; ... a future founded on the recognition of human rights ... for all South Africans ...' ... it suggests a change in mental attitude.

The abolition of corporal punishment and the death penalty in South Africa are examples of instances where the country's parliament and judiciary worked within the context of South

²⁹Burchell (2011) op cit note 18 at 9-10.

³⁰Simeon CR McIntosh *Fundamental Rights and Democratic Governance: Essays in Caribbean Jurisprudence* (2005) 230.

³¹Ibid at 235.

³²1995 (2) SACR 1 (CC) at 85 para B – 86 para B.

Africa's Constitution to uphold a Bill of Rights standard for punishment. Soon after the Constitutional Court declared the punishments unconstitutional in *S v Williams and Another*,³³ and *S v Makwanyane*,³⁴ Parliament passed three pieces of legislation: the South African Schools Act 1996,³⁵ which repealed corporal punishment in schools; the Criminal Law Amendment Act 1997,³⁶ which repealed the death penalty; and the Abolition of Corporal Punishments Act 1997,³⁷ which abolished judicial corporal punishment. These outcomes were hinged on s 12(1)(e) of the Constitution, which guarantees to '[e]veryone ... the right to freedom and security of the person, [including] the right ... not to be treated or punished in a cruel, inhuman or degrading way', as well as the guarantee for human dignity protected by s 9 of the Constitution. The setting aside of the death penalty was also because it violated the guarantee provided by s 11 of the Constitution with regards to the right to life.³⁸ In the Interim Constitution under which *Williams* and *Makwanyane* were decided, these rights were protected under ss 9, 10 and 11(2).

The right to a fair trial requires further elucidation. As noted earlier, subsumed under the right are guarantees that a trial will comply with due process and the rule of law. The nature of the guarantees has been the subject of judicial interpretation. In the pre-constitution era, courts interpreted the guarantees as requiring compliance with the rules and procedures laid down by law, rather than with 'notions of basic fairness and justice'.³⁹ Where rules of procedure have been complied with, the requirements of fair trial would have been satisfied. However, this rather restrictive construct was abandoned in the post-apartheid era, starting with *S v Zuma*,⁴⁰ where the Constitutional Court held that the right ought to be interpreted in a manner that gave content to

³³ 1995 (3) SA 632 (CC).

³⁴ Supra note 32; the Constitutional court held (at 54 para H-55 para A and 56 paras F-I) that offenders are entitled to assert the rights to life, dignity and the right not to be subjected to cruel, inhuman and degrading punishment. The rights are absolute and cannot be taken away.

³⁵ Act 84 of 1996.

³⁶ Act 105 of 1997. It made provision for the setting aside of all death sentences and the repeal of all provisions relating to the death penalty.

³⁷ Act 33 of 1997.

³⁸ Other amendments have introduced sentencing options to the range of punishments. Section 41(a) of the Correctional Services and Supervision Matters Amendment Act 122 of 1991 added correctional supervision and a sentence of imprisonment from which an inmate 'could be placed on correctional supervision in the discretion of the Commissioner or Parole Board. There have been subsequent amendments since the 1997 Act as well.

³⁹ See *S v Rudman and Another*; *S v Mithwana* 1992 (1) SA 343 (A) at 377, See also *S v Mofokeng* 1962 (3) SA 551 (A) at 557; *S v Alexander* (1) 1965 (2) SA 796 (A) at 808G-809D; *S v Tyebela* 1989 (2) SA 22 (A) 29G-I,

⁴⁰ 1995 (1) SACR 568 (CC).

‘notions of basic fairness and justice’.⁴¹ This meant that the inquiry into whether the right had been violated must extend beyond determining whether formalities and rules of procedure for initiating or conducting criminal trials had been complied with. To give content to the right therefore, the Constitutional Court relied on traditions of constitutional interpretation that construe constitutional provisions by having recourse to the character of the instrument, the socio-historical origin of the concepts it advances, the purpose or interests it seeks to protect and traditions of usage that confer meaning on the language of the instrument.⁴²

Thus, *Zuma* established judicial authority for the proposition that fair trial must be defined by the Constitution, in accordance with the rules of constitutional interpretation that favour a generous and purposive approach.⁴³ The right as provided for under s 35(3) of the 1996 Constitution has a number of components, such as the presumption of innocence, the right to be afforded adequate time and facilities to prepare a defence, speedy trial, and the right of appeal. In relation to sentencing, the right obligates courts to conduct hearings or appeals against sentence in a manner that meets with substantial fairness.⁴⁴

Zuma also explained the developmental role that the Constitution enjoins courts to discharge when applying the Bill of Rights to criminal law. It found that the Constitution obligated courts to promote the underlying values of an open and democratic society, which, within the Constitutional scheme, esteemed individual freedoms.⁴⁵ In *Makwanyane*,⁴⁶ these values were interpreted as promoting *Ubuntu*, an African value that embraces humaneness, compassion, respect, human dignity, morality, conciliation, reparation, social cohesion or communality, amongst others.⁴⁷ The contemporary concept of justice that captures this principle is restorative justice, an ideal that Bennett⁴⁸ has described as promoting reconciliation (usually

⁴¹ Ibid at 570 para D.

⁴² Ibid at 570 para B & 579 para B.

⁴³ Ibid at 577 para H – 579 para B.

⁴⁴ *Jacobus Bogaards v The State* [2012] ZACC 23 (CC) paras 45, 52, 61 & 64.

⁴⁵ *S v Zuma* supra note 40 at 580 paras A-B. The court found the obligation stipulated in s 35 of the Interim Constitution. The function has been preserved by s 39 of the 1996 Constitution.

⁴⁶ Supra note 32 at 13 para B – 14 para A.

⁴⁷ Ibid at 52 para D – 53 para B, 85 para H – 87 para A and 105 para G – 107 para E.

⁴⁸ TW Bennet ‘Ubuntu: An African equity’ (2011) Vol. 14 No. 4 *PER/PELJ* 30-61 at 34-36. Bennett explained that sentencing decisions by South African courts have shown sensitivity to the need to integrate reconciliation and restoration. The restorative justice ideal has also been introduced into legislation, such as the Child Rights Act 75 of

between the offender and his or her victim) and, on the larger scale, social harmony. Bennett⁴⁹ describes the principle as ‘one of the central aims of South Africa’s sentencing policy’.

In *Makwanyane*, the aforementioned constitutional values were held to have a direct impact on the death penalty⁵⁰ in the sense that they facilitate South Africa’s transition from its fractured past, when the death penalty was indiscriminately used to entrench social disharmony, to a new society in which punishment assumes a different character and object to which the death penalty is antithetical. Viewed critically, the *Makwanyane* decision offered more than a legal textual analysis of the constitutional prohibitions against punishment that offend constitutional principles. It elucidated a political rationality and a transformative vision that necessarily impacted on the restorative (rather than vindictive) roles that punishment ought to play in society. Essentially therefore, punishment may not be construed outside the context of the transformative vision. For example, to unveil the meaning and give individuals the full measure of the protection guaranteed by the constitutional prohibition against inhuman and degrading punishment viz the death penalty, the court had to purposively and generously construe the prohibition through the contextual lens of the historical background of the Constitution, the character and overarching transformative objects of the Constitution itself and the Bill of Rights.⁵¹ This contextual approach led the court to find that the prohibition against inhuman and degrading punishment was associated with the rights to equality before the law, life and human dignity,⁵² and that the death penalty violated them all.⁵³

2008, and in pending legislative bills, such as the Traditional Courts Bill. The author also noted that the South African Law Reform Commission has also recommended it for community tribunals in townships.

⁴⁹ Ibid at 35.

⁵⁰ *S v Makwanyane* supra note 32.

⁵¹ Ibid at 13 paras F-H.

⁵² These rights were provided for in ss 8, 9 and 10 of the Interim Constitution. Section 8 also provides for the right to equal protection of the law. These provisions have been retained with alterations in ss 9, 10, 11 and 12 of the 1996 Constitution. Section 12(1)(e) prohibits cruel, inhuman and degrading punishment.

⁵³ *S v Makwanyane* supra note 32 at 57 paras D-H; See also *S v Dlamini*, *S v Dladla and Others*, *S v Joubert*, *S v Shietekat* 1999 (4) SA 623 (CC) at para 2, where Kriegler J held that the Bill of Rights ‘exposed all existing legal provisions, whether statutory or derived from common law, to reappraisal in the light of the new constitutional norms heralded by [the] transition’. See also *S v Williams and Another* supra note 34, *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T); *Case v Minister of Safety and Security*, *Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC); See further *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC); *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (5) SA 30 (CC); *S v Hobo*, 2009 (1) SACR 276 (SCA); *S v M*, 2004 (3) SA 680 (O); See further Burchell (2011) op cit note 18 at 14-34.

Being some of the earliest pronouncements of the Constitutional Court on the subject of punishment and constitutional rights, the *Williams*, *Makwanyane* and *Zuma* cases may be described as authorities for the judicial policy that criminal penalties must be infused with human rights. Likewise, the process of judicial sentencing, the interpretation of penal provisions and the use of judicial discretion in sentencing must reinforce human rights.⁵⁴ The full measure of the impact of these values on penal policy will understandably be developed on an ongoing basis. Section 39(1)(a),⁵⁵ read together with s 8(3)⁵⁶ of the 1996 Constitution, allows enough elasticity to ensure that judicial interpretations of the Bill of Rights respond to new understandings about rights and their interactions with punishment.⁵⁷

4.3.3 The Legislative Framework

As explained above, the 1996 Constitution establishes the benchmark that criminal legislation must comply with. The principal sentencing legislation in South Africa is the Criminal Procedure Act 1977 (1977 Act).⁵⁸ Prior to the adoption of the Constitution, a court derived its power to sentence offenders from the Act, from several specific statutes that create offences and prescribe penalties therefor and from the common law, subject to the sentencing jurisdiction conferred upon the court by statute. Hence, while courts may impose any of the punishments prescribed by the 1977 Act, other penal legislation or the common law, the quantum of the penalty must be within the jurisdiction awarded to them by law. Limitations on sentencing jurisdiction typically

⁵⁴ See *S v Salzwedel and Others* 2000 (1) SA 786.

⁵⁵ The provision requires courts to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom' when interpreting constitutional rights.

⁵⁶ Section 8(3) obligates courts to apply, or where necessary, develop the common law to the extent that legislation has failed to give effect to a right in the Bill of Rights. The court may also develop the common law in order to limit the right, to the extent allowed by s 36 of the Constitution, regarding the limitation of rights.

⁵⁷ See *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at 885 para D – 887 para; *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE) at 152 paras D-H. In *S v Makwanyane* supra note 32, *S v Zuma* supra note 40 and *S v Williams and Another* supra note 33, the Constitutional Court made copious references to foreign decisions on the death penalty, the reversal of the onus of proof regarding the voluntariness of confessionary statements and corporal punishment. See also *Masiya v Director of Public Prosecutions* supra note 53 at 51 para G to 52 para D, where the Constitutional Court extended the common law definition of rape to include non-consensual anal penetration of the female, thereby making it consistent with the spirit, purport and objects of the Bill of Rights.

⁵⁸ Act 51 of 1977.

apply to magistrate courts, allowing them to impose imprisonment or fines up to a specified duration or amount. High courts have unlimited jurisdiction.⁵⁹

Chapter 28 of the 1977 Act deals with several aspects of sentencing, including jurisdiction and procedure, the proffering of evidence during sentencing, the types or range of punishment that may be imposed and the circumstances in which they may be imposed. Section 276(1) of the Act provides a range of punishments that may be imposed for statutory or common law offences.⁶⁰ These include imprisonment (for a definite or indefinite period, or for life), periodical imprisonment, declaration as a habitual criminal, committal to an institution established by law, correctional supervision, or imprisonment with the possibility that the offender may – at the discretion of the correctional officer – be subjected to correctional supervision. The court's power to impose these punishments is subject to provisions of the Act, other penal statutes that stipulate offences for specific crimes⁶¹ and the common law. Given the principle of legality, a court may – subject to its jurisdiction - only impose punishments that have statutorily recognized and prescribed, or that are permissible under common law.⁶²

Another important statute is the Criminal Law Amendment Act 1997⁶³ (1997 Act). Section 51 of the Act instated minimum sentences for serious or violent offences, ranging from robbery to drug related offences, dealing in or smuggling firearms and ammunition, rape and murder. The statute became the key framework for sentencing for crimes that fall within the categories provided for. Subsequently, in 2007, two other statutes, namely the Criminal Law (Sexual Offences and Related Matters) Amendment Act⁶⁴ and the Criminal Law (Sentencing)

⁵⁹ Van Zyl Smit op cit note 14 at 49-3.

⁶⁰ Regarding common law crimes in South Africa, see JRL Milton *South African Criminal Law and Procedure Volume II, Common-Law Crimes* 3rd ed. (1996); with the exception of statutory crimes, crimes in South Africa are common law crimes. Examples of common law crime in South Africa include murder, robbery, housebreaking, high treason, bigamy, theft, culpable homicide, obstructing the course of justice, contempt of court, assault, arson, etc. See also South African Police Service, 'Common Law Offences', available at http://www.saps.gov.za/crimestop/common_offence_definitions.htm, [accessed February 2 2013].

⁶¹ An example is the Prevention of Organized Crimes Act, which is discussed in section 4.3.1c below.

⁶² According to subsec 2 of the provision, no provision of the Act shall authorize a court to impose a sentence that is beyond its sentence jurisdiction. The provision also recognizes that the court may impose any statutory penalty that is prescribed in respect of an offence, or impose forfeiture in addition to any other punishment.

⁶³ Act 105 of 1997.

⁶⁴ Act 32 of 2007.

Amendment Act were enacted.⁶⁵ The latter largely amended s 51, and its provisions were incorporated into the 1997 Act.

4.3.4 Judicial Elucidations of the Objects and Principles of Sentencing

Having examined the legislative framework for sentencing, the stage is set for an analysis regarding how proportionality principles and the theories of sentencing find expression in the normative framework. For the reasons disclosed in chapter two, the theories are regarded as the purposes, aims or objects of sentencing.⁶⁶ Given that there are no statutory statements regarding the objects of sentencing in South Africa, the focus of the section is on judicial pronouncements regarding the objects.

4.3.4.1 The Objects of Sentencing

Through several judicial pronouncements South Africa's Supreme Court of Appeal has enumerated the objects to which sentencing may be directed. Some of these were made while the court was constituted as the Appellate Division. Thus, in 1945 in *S v Swanepoel*,⁶⁷ after having identified deterrence, crime prevention, reformation and retribution as the objects of punishment, the Appellate Division proceeded to impose a sentence that was swayed (apparently) by juristic opinions that favoured deterrence.⁶⁸ Nevertheless, the court affirmed the need for proportion, measured on the basis of the offender's blameworthiness. It acknowledged also that disproportionate sentences tend to weaken the deterrent effect of punishment, and that mitigating

⁶⁵ Act 38 of 2007. The three statutes will be discussed later in this thesis, with particular attention to how they impact sentencing proportionality and consistency.

⁶⁶ See chapter 2 section 3 regarding why theories are referred to as the objects or goals of sentencing.

⁶⁷ 1945 AD 444 at 451-455.

⁶⁸ For example, the judgment quotes the following words by Beccaria: '[t]he end of punishment... is ... to prevent the criminal from doing further injury to society, and ... others from committing the like offence. Such punishments, therefore, and such a mode of inflicting them, ought to be chosen, as will make the strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal.' Again, it quotes Salmond, (*Jurisprudence*, 3rd ed), that '[t]he ends of criminal justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative, and (4) Retributive. Of these aspects the first is the essential and all important one, the others being merely accessory. Punishment is before all things deterrent, and the chief end of the law of crime is to make the evil-doer an example and a warning to all that are like-minded with him'.

factors, whenever present, should reduce blameworthiness and punishment to the extent that is appropriate to the circumstances of the case.⁶⁹

These objects represent interests that compete for dominance in sentencing, with the result that sentences may sometimes reflect different levels of emphasis on any one object. In the 1966 case of *R v Karg*,⁷⁰ the Appellate Division was mindful of this competition and observed that judicial rulings had taken a tendency to assigning preeminent roles to crime prevention and correction, over and above other objects. This prompted the court to reiterate the important role that punishment fulfilled in expressing society's natural indignation over crime.⁷¹ Affirming this role highlights one of the functions that retributivists assign to punishment. Overall however, the court seems to have endorsed a more significant role for deterrence.⁷² More than a decade later in *S v Rabie*,⁷³ the Appellate Division even more directly reiterated the subservient function that retribution had come to assume in sentencing. Subsequent judgments have since relegated retribution to a secondary role, while affirming the primacy of deterrence at the same time; in the 1984 case of *S v Khumalo and Others*⁷⁴ the Appellate Division observed that retribution had diminished in significance and that [d]eterrence had come to be 'described as the "essential", "all important", "paramount" and "universally admitted" object of punishment' to which all 'other objects are accessory'.⁷⁵ In the post-transition⁷⁶ case of *S v Makwanyane*⁷⁷ also, considerations of deterrence and prevention weighed heavily on the mind of the Constitutional Court. The court took the position that retribution ought not to be given undue weight when balancing the objects and factors that should influence the choice of punishment.⁷⁸ Thus, even though judicial

⁶⁹ Ibid.

⁷⁰ 1961 (1) SA 231 (A).

⁷¹ Ibid at 236 paras A-B. According to the court, it was appropriate for society to express its natural indignation about crime through punishment. See also *S v Van de Venter* 2011 (1) SACR 238 (SCA) at 244 paras B-E, where the SCA held that the natural indignation that the community feels over the appellant's conduct calls for proper recognition in the sentence.

⁷² *R v Karg* supra note 71 at 236 para A; see also *S v Selebi* (25/09) [2010] ZAGPJHC 53 (5 July 2010) at para 1.

⁷³ Supra note 12.

⁷⁴ 1984 (3) SA 327 (AD); in this case, the Appellate Division reversed the sentence of the trial judge because it laid undue emphasis on retribution. It held that the lower court misdirected itself when it did not give proper consideration to deterrence and rehabilitation.

⁷⁵ Ibid at 330 para E.

⁷⁶ The post-transition period refers to the era of constitutional democracy in South Africa.

⁷⁷ Supra note 32.

⁷⁸ Ibid at 446 para C.

emphasis on particular objects shifted over time, deterrence has come to enjoy primacy, before and after the adoption of a Constitution. Below is an illustration of how courts have tried to resolve competition between the objects of punishment.

4.3.4.2 *Fitting the Objects into Punishment*

One of the challenges that confronted courts in the abovementioned cases was how the principles of punishment functioned in the selection of punishments, or determined what considerations should prevail over the choice of sentence. Adding to the intricacy of the challenge is the fact that individual criminal cases present diverse peculiarities, varying levels of seriousness and blameworthiness and a complex mix of mitigating and aggravating factors. How these factors interact make sentencing for each crime unique.

Courts have developed different principles to regulate how they decide the objects that should influence the choice of an appropriate punishment. The older tradition required that punishment should fit the crime. This principle was applied in the 1923 case of *R v Motsepe*.⁷⁹ In that case, the court explained that the principle encapsulates those factors, such as the nature of the offence, its prevalence, the difficulty of detection, the need to communicate effective deterrence (in the public interest) and the interest of the accused, that should guide the discretion of the judge. The last two factors suggest that punishment should entertain the possibilities of reformation and should not be so cruel as to jeopardize the public interest, for example, by hardening the criminal.⁸⁰ The *Motsepe* case was relied upon in the 1959 case of *R v Zonele*,⁸¹ which took a step further by expressly requiring that punishment must also fit the criminal.⁸² Both cases contribute to a host of judicial authorities that establish a judicial tradition of individualizing punishment by weighing the public interest and the interest of the offender.

⁷⁹ 1923 T.P.D 380. Considering these factors, the court reduced the sentence imposed by the trial court from eight lashes to four and upheld the sentence of four years' imprisonment. Judicial whipping is now unconstitutional.

⁸⁰ Ibid at 381.

⁸¹ 1959 (3) SA 319 (A); this concept and the requirement that punishment must seek the public interest were not necessarily missing from the *Motsepe* case. It was subsumed under the court's opinion that punishment should not be excessive, lest the offender becomes a hardened criminal. However, subsequent cases made the interest of the accused and the public express requirements.

⁸² Ibid at 330(E); Judicial decisions have generally affirmed this principle. See *The State v Xolani Matiwane*, 2013 (1) SACR 507 (WCC); *R v Karg* supra note 70; *S v Salzwedel and Others* 2000 (1) SA 786 (SCA) at para 20.

These decisions also affirm the discretion of the court in selecting the type and measure of punishment.⁸³ In *S v Zinn*,⁸⁴ this deliberative process was moulded into a triad comprising the crime, the criminal and the interests of society. South African courts have consistently affirmed the triad.⁸⁵

At the heart of fitting punishment to the crime and criminal is a delicate process of balancing interests that compete in punishment, so that no one factor (or objective) is unduly weighted against the others⁸⁶ in the effort to establish proportionality between the crime and the punishment. In the *Salzwedel* case,⁸⁷ the court observed that the competition was an inherent feature of the triad and enjoined sentencers to ensure that the offender's interest received appropriate consideration. The decision is also notable for its affirmation of the legitimacy of the public indignation that is expressed through punishment and for its emphasis on the need for courts to communicate – through punishments of course – that serious crimes that violate the values protected by the Constitution will be severely dealt with. This indicates that courts will continue to impose punishments that convey retribution among other messages. Indeed, retribution permeated the court's obviously deterrent focus. The focus on deterrence serves the public interest and has been consistently preserved in judicial sentences. In *Zinn*⁸⁸ therefore, the interests of society necessitated a heavy sentence for the respondent's crimes of fraud and theft. In *Karg*⁸⁹ the trial court reasoned that the interest of society was as important as the individual harm caused by the crime. In *Khumalo*⁹⁰ also, it was held that the appellants deserved a sentence that expressed the indignation of the victims of their crime and the society at large. However,

⁸³ See for example, *R v Berger & Another* 1936 AD 334 at 339-340; *R v Taljaard* 1924 T.P.D 581; *Mudau v The State* (764/12) [2012] ZASCA 56 (9 May 2013).

⁸⁴ 1969 (2) SA 537 (A).

⁸⁵ *S v Salzwedel and others* supra note 82 at 794 paras B-E, See also *S v Shilubane* 2008 (1) SACR 25 (T) at para 4; *S v Mashiloane* 2013 (1) SACR 587 (GNP) at 589 paras E-D; *S v Makhakha* 2014 (2) SACR 457 (WCC) 457 at 457 paras E-H.

⁸⁶ *Moswathupa v S* 2012 (1) SACR 259 (SCA).

⁸⁷ Supra note 82 at 794 paras B-E.

⁸⁸ Supra note 85; the court held that the triad had to be considered when imposing sentence. Regarding the circumstances of the respondent's crimes, the court held that the sentence of 15 years' imprisonment imposed by the lower court was justified. However, the respondent's old age (he was 58 years) and poor health were mitigating factors. It accordingly substituted the 15-year sentence with a 12-year sentence. See p 540 para G, p 542 paras A-F.

⁸⁹ Supra note 70.

⁹⁰ Supra note 74.

indignation is no reason for imposing ‘a sentence that is out of proportion to the nature and gravity of the offence’.⁹¹

Notwithstanding the prominence that deterrence has achieved, the possibility of reformation operates as a moderating factor. Thus, it was held in *Khumalo* that while an appropriate sentence in a given case ‘should be sufficiently severe to deter others’, consideration ought to be given to the possibility that the offender may change his behaviour.⁹² In an earlier case, *R v Owen*,⁹³ the accused person’s character and chances that he will amend his behaviour were considered to be relevant factors for fixing a sentence. Both cases indicate that sentencers must find a balance between goals that jostle for prominence in a sentence. However, striking a balance does not mean that the outcome (i.e., the sentence) will reflect an equal consideration of all sentencing factors and objects. In *S v Gardener*⁹⁴ the Supreme Court of Appeal acknowledged that the weight that is attached to each object and to the accused and his crime, will differ. This is to be expected; the nature of each crime, the circumstances surrounding its commission and the personal circumstances of the offender will often determine which object receives a dominant consideration.⁹⁵ In *R v Mzwakala*⁹⁶ the appellant loosened the rails on a railway track, causing two trains to derail. The Appellate Division rightly regarded the crimes as seriously endangering public safety and felt persuaded to accord ‘deterrence ... [an] even greater weight, proportionately, than it generally accorded’.⁹⁷ As a balancing measure however, the court held that the gravity of the crime should not preclude a consideration of the subjective elements of the offender and his crime.⁹⁸ In this case, the court regarded the absence of a criminal history, the fact that the offender laboured under a sense of being unjustly denied his work benefits and had not acted with an intention to cause death, to be mitigating factors that were relevant to

⁹¹ *S v Van de Venter* supra note 71 at 244 paras B-E.

⁹² *S v Khumalo* supra note 74 at 332 para E; the appellant was sentenced to 24 years imprisonment while his two co-appellants were sentenced nine years imprisonment each. The appellate court halved the sentences.

⁹³ 1957 (1) SA 458 (A) at 462 para F.

⁹⁴ 2011 (1) SACR 570 (SCA).

⁹⁵ *Ibid* at para 69.

⁹⁶ 1957 (4) SA 273 (A); the appellant was charged for murder and assault. He committed the crime to protest his grievance at being denied certain entitlements by his employers, the South African Railway.

⁹⁷ *Ibid* at 277 para A.

⁹⁸ *Ibid*. See also Jonathan M Burchell & John Milton *Principles of Criminal Law* 3 ed (2005) 78.

determining a quantum of punishment that was proportionate to the objective gravity of the crime. The section below deals more specifically with how courts determine proportionality.

4.3.4.3 *Proportionality: The Measure between Crime and Punishment*

As held in *S v Dodo*,⁹⁹ proportionality is a constitutional principle that ‘goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading ...’ Proportionality requires finding the balance between the crime, the offender and the public interest.¹⁰⁰ The much cited *locus classicus* on the subject is *S v Rabie*. There, the Appellate Division drew on judicial enunciations of the principles that should inform sentencing and formed the view that ‘[p]unishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances’.¹⁰¹ As will be shortly illustrated, the fourth principle, that is, punishment should ‘be blended with a measure of mercy’ restates a principle of moderation that has long been applied by South African courts. *Rabie* brought all four principles together, making it a comprehensive and authoritative statement of the judicial approach to sentencing. The principles are briefly explained below:

I. Punishment must Fit the Crime

The idea of fitting punishment to the crime invokes retributive concepts of moral blameworthiness (just deserts) and proportionality. At the core of the just deserts principle is the notion that punishment must be deserved. The proportionality principle that is implicit in the notion regulates punishment, increasing its severity as the gravity of the criminal wrong or harm increases.¹⁰²

II. Punishment must Fit the Criminal

⁹⁹ 2001 (3) SA 382 (CC) at 403 para H; see also Van Zyl Smit op cit note 14 at 49-9 and 49-10.

¹⁰⁰ *Opperman and Another v S* [2010] 4 All SA 267 (SCA), see particularly para 30; See also *Mudau v S* [2012] ZASCA 56 para 18.

¹⁰¹ *S v Rabie* supra note 12 at 862 para G.

¹⁰² See for instance, *S v Mzazi* 2006 (1) SACR 100 (E) at 103B-D where the court held, having regard to the offender’s bad criminal record, that the petty offence he committed necessitated a ‘proportionate and reasonable sentence’ that reached for the upper limits; *Mopelwa v S* [2011] ZANWHC 101 (15 December 2011).

This principle emphasizes the individualization of punishment;¹⁰³ it requires a consideration of the personal circumstances of the offender, which may unveil mitigating or aggravating factors and inform the levels of emphasis that will be placed on deterrence, prevention, rehabilitation or retribution. The principle pervades sentencing decisions in South Africa. In *S v Whitehead*¹⁰⁴ the appellant's grievous crime called for a severe sentence, but the Appellate Division held that the appropriate punishment must have regard to the appellant's history and circumstances, as well as the subjective elements of his crime.¹⁰⁵ In *S v Van de Venter*¹⁰⁶ also, the Supreme Court of Appeal interfered with the lower court's sentencing discretion because that court ignored evidence that showed that the appellant, a schizoid and emotionally depressed person who had a difficult family upbringing, had diminished moral responsibility for the grave crimes that he committed. Accordingly, it imposed a lighter sentence. In *Fanie Masenye Moswathupa v The State*¹⁰⁷ also, the Supreme Court of Appeal reversed the sentence of the lower court because it overemphasized the seriousness of the offence and the interests of society, without giving proper weight to the personal circumstances of the offender, which should have mitigated the sentence.¹⁰⁸ In summary, the principle calls for balancing the objective gravity of the crime with its subjective elements.

III. Punishment must be Fair to Society

¹⁰³ *S v Blank* (1995) 1 SACR 62 (A). See also *Mudau v The State* supra.

¹⁰⁴ 1970 (4) SA 424 (A) at 436 para F; the appellant in this case was sentenced to 15 years imprisonment on one count of murder, and 7 years imprisonment on a second count of assault. The sentences were ordered to run consecutively, making an effective prison term of 22 years. On appeal, the Appellate Division, after considering the appellant's personal circumstances (appellant had a very disturbed childhood that left him emotionally underdeveloped), upheld the sentences but also held that (i) the trial court failed to take into consideration the long term effect of the cumulative sentence on the appellant; (ii) although the trial court observed that the appellant was capable of being reformed, it did not take that into consideration when imposing sentence; (iii) accordingly, the sentences were reviewed with 6 years of the 7-year sentence to run concurrently with the 15-year sentence. See also *S v Peterson en 'N Ander* 2001 (1) SASV 16.

¹⁰⁵ See also *S v Blank* supra note 104 where the Appellate Division noted that South African courts have long emphasized the importance of individualizing punishments; see also *Mudau v The State* supra.

¹⁰⁶ 2011 (1) SACR 238 (SCA) at pp 242-3.

¹⁰⁷ [2011] ZASCA 172.

¹⁰⁸ See also *S v Khumalo* supra note 74 where the Appellate Division observed that the sentencing judge misdirected himself when he did not give consideration to whether a lesser prison term would not have served the aims of reformation and rehabilitation better.

This principle sustains society's interest in punishment. This interest has generally been interpreted to include the need to protect society from criminal harm,¹⁰⁹ to do justice to the community,¹¹⁰ to deter further offending,¹¹¹ or even reform the offender.¹¹² This last point was taken into consideration in *S v Skenjana*¹¹³ where the Appellate Division held that reliance on excessively long deterrent incarcerations injured public interests by frustrating rehabilitation. In the court's words:

In a case such as the present the Court must give heed to the demand of the ordinary citizen for the condign punishment of robbers who invade the sanctity of the home to commit rapine and violent assault and worse. But that demand may well be satisfied by the imposition of less than the most severe sentence. Nor is it in the public interest that potentially valuable human material should be seriously damaged by long incarceration. As I observed in *S v Khumalo and Another* ..., it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner....

The concern that punishment should be set in a way that enhances the chances of reformation often recur in sentencing decisions. In *S v Jansen and Another*¹¹⁴ the court was disposed to a sentence that offered the criminal the opportunity to reform and reintegrate with society. *S v Van de Venter*¹¹⁵ advanced the same rationality: deterrence and retribution may be appropriate objects in punishment, but they do not override other objects of sentencing. Neither would excessive (deterrent or retributive) punishments promote justice or serve the interests of society.¹¹⁶ Ultimately then, punishment is fair to society when it enhances public safety or some other common good, either because the offender or would-be offenders are deterred, or better still because it enhances the offender's chances of being rehabilitated and becoming a productive member of the society.

¹⁰⁹ Especially from crimes with high social costs. See *S v Blank* supra at 73b-e; in this case, the need to protect society from prevalent white-collar crimes inclined the court toward a severe prison sentence.

¹¹⁰ Either by assuaging the public indignation that is evoked by crime, or by sustaining public interest in the fair administration of justice. See *R v Karg* supra note 70 at p 236.

¹¹¹ *S v Zinn* supra note 84 at 542.

¹¹² See Peter Reynor & Gwen Robinson 'Why help offenders? Arguments for rehabilitation as a penal strategy' (2009) Vol. 1 No. 1 *European Journal of Probation* 3-20 at 7-9.

¹¹³ 1985 (3) SA 51 at 55.

¹¹⁴ 1975 (1) SA 425 (A); see also *S v Nkosi* 2002 (1) SACR 135 (W) at 143; *S v Phulwane and Others* 2003 (1) SACR 631 (T) at 635 paras 10-11.

¹¹⁵ *S v Van de Venter* supra note 71.

¹¹⁶ Ibid at 244 paras B-E.

IV. Punishment Must Be Blended with a Measure of Mercy According to the Circumstances

This principle espouses the need to approach sentencing dispassionately, to eschew emotiveness when considering factors that weigh against and in favour of the offender and to avoid unnecessary severity. The principle recommends a rational, humane and compassionate disposition to sentencing and encourages a judicial mind-set that seeks to preserve the sentencer's humaneness, by treating the offender humanely. In *S v Rabie*, Holmes JA described the principle:

[M]ercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society.¹¹⁷

Again, Holmes JA held:

[W]hile fair punishment may sometimes have to be robust, an insensitively censorious attitude is to be avoided in sentencing a fellow mortal, lest the weighing in the scales be tilted by incompleteness.¹¹⁸

Holmes JA seems to have bequeathed to the bench some well-reasoned judicial pronouncements on the subject of mercy in punishment. For him, mercy is elemental to justice. In 1975, five years before *Rabie* was decided, Holmes JA made the following oft quoted statement, in *S v Harrison*:¹¹⁹ '[j]ustice must be done; but mercy, not a sledge-hammer, is its concomitant'. Relying on the same principle two years later in the 1972 case of *S v Sparks and Another*,¹²⁰ he cautioned against excessive sentences for crimes that required emphatically deterrent punishments.¹²¹ That same year, he held in *S v V*:¹²²

The element of mercy, a hallmark of civilised and enlightened administration, should not be overlooked, lest the Court be in danger of reducing itself to the plane of the criminal; ... True mercy has nothing in common with soft weakness, or maudlin sympathy for the criminal, or permissive tolerance. It is an element of justice itself.

The need for a rational, humane and compassionate approach to punishment has been echoed by other judgements, not the least of which is *Makwanyane*, discussed below.

¹¹⁷ Supra note 12 at 861 para D.

¹¹⁸ Ibid at 862 paras C-D.

¹¹⁹ 1970 (3) SA 684 (A) at 686 para A.

¹²⁰ 1972 (3) SA 396 (A).

¹²¹ Ibid at 410 paras G-H.

¹²² 1972 (3) SA 611 (A) at 614 paras D-E.

4.3.4.4 *A Rational and Humane Approach to Punishment: Proportionality as a Moderating Principle*

No study of sentencing principles in South Africa will be complete without discussing the Constitutional Court's views in *Makwanyane* regarding the objects and factors that should influence the choice of punishment. Four points are particularly noteworthy. The first is the requirement that personal and subjective elements that may have disposed the offender to commit the crime must be evaluated against the main objects of punishment.¹²³ This requires that sentences be personalized, regardless of whatever object the court considers to be decisive in the choice of punishment. Personalizing (or individualizing) punishment requires evaluating aggravating or mitigating factors. The objects must also be weighed against other penal alternatives at the court's disposal.¹²⁴

Secondly, while retribution rightly expresses moral outrage over crime, it must not unduly burden the balancing process in sentencing. Retribution must be moderated and must yield to the new constitutional ethos of conciliation, which affirms the rights of prisoners, delineates permissible limits to the restriction of those rights, promotes humaneness in punishment and echoes elements of reformation and restorative justice.¹²⁵ This view, as expressed in *Makwanyane*, calls for new attitudes about retribution. Indeed, at certain points in the judgment, the court sounded pejorative about unbridled expressions of retribution in punishment.¹²⁶

¹²³ *S v Makwanyane* supra note 32 at 26 para F – 27 para A.

¹²⁴ Ibid at 54 paras D-E.

¹²⁵ Ibid at 48 para E – 53 para B, 72 paras H- 73 C, 85 para H - 8 para A, 105 para G - 106 para E and 109 para G - 110 para D; in his concurring judgment (at 88 para D - 91 para B), Justice Madala argued that the reformatory theory of punishment inherent in the African concept of Ubuntu is mentioned in the postamble of the 1993 Interim Constitution and permeated the Constitution. For discussions on Ubuntu, restorative justice and the South African Constitution, see Anderson A.M 'Restorative justice, the African philosophy of Ubuntu and the Diversion of Criminal Prosecution' available at www.isrcl.org/Papers/Anderson.pdf, accessed 2 February 2013. However, see also Johan Van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005) 101-120.

¹²⁶ Note, however, that recent judgments have iterated a necessary role for retribution. According to the SCA in *S v Van der Westhuizen* 2011 (2) SARC 26 (SCA), 'deterrence and retribution do not recede into the background, as in cases of substantial diminished responsibility'. The statement suggests that the subjective circumstances of the offender and the crime will often influence the weight that is attached to each object of punishment. In this case, the accused person showed a persistent lack of remorse that revealed itself in patterns of self-exoneration. He had undergone long years of treatment and was reported to 'have a relatively minor degree of diminished responsibility'. That, in addition to the fact that he continued to be 'a potential danger' to those who were close to him, forced retribution and deterrence into reckoning. In the even more recent case of *Mudau v S* supra, the circumstances of the

Punishment, the court held, must be consistent with the values protected by the Constitution. However, the object or principle that is allowed dominance in the choice of penalty depends on the circumstances of each case.

Thirdly, *Makwanyane* elaborated the proportionality test. Until this decision, questions about proportionality were resolved by balancing the triad. *Makwanyane* changed that and established – while also affirming the triad – that the test must also be evaluated in the light of constitutional protections against cruel, inhuman or degrading punishments.¹²⁷ Punishment that offends these protections would presumably be grossly disproportionate.¹²⁸ In *Makwanyane*, the Constitutional Court considered the terrible and irremediable nature of the death penalty and the inconsistencies and arbitrariness that attend its use to be relevant issues in determining whether the penalty was proportionate to the components of the triad.¹²⁹

The fourth point to emerge from *Makwanyane* is the recognition that punishment limits rights. The recognition brought sentencing – and the proportionality test in particular – under the purview of s 33(1) of the Interim Constitution. The provision stipulates conditions that limitations on rights must comply with. It has been replaced by s 36(1) of the 1996 Constitution, which provides:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;

crime and the prevalence of rape moved the court to acknowledge that retribution will in certain cases ‘take a more prominent role than the other sentencing objectives’. However, even when retribution takes prominence, the court held that other sentencing goals cannot be discarded altogether. Retribution must be balanced with the other objects. *Van der Westhuizen* and *Mudau* show that expressing retribution through punishment may be justified, but it has to be in proportion with relevant considerations regarding other interests in punishment. As Terblanche points out, the best act of retribution is achieved through an appropriate sentence and not one that is disproportionately lenient or severe. See Terblanche (2007) op cit note 2 at 171.

¹²⁷ Section 11(2) of the interim constitution, now s 12(1)(e) of the 1996 Constitution.

¹²⁸ This is the logical point to draw from *Makwanyane* supra note 32 at 41 paras C-E.

¹²⁹ That is, the punishment must be proportionate to the interest that the society seeks to preserve, the interests of the offender, as well as the gravity of the crime. In *Makwanyane*, the Constitutional Court held that the death penalty did not serve any public interest and denied the offender his rights to life and human dignity, while the requirement of retribution for the offender’s crimes of murder could be met with a long term of imprisonment.

- (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.¹³⁰

The Constitutional Court's adopted three lines of inquiry to explain how the provision applied to punishment:

- i. Whether the objective of the limitation can be justified in an open and democratic society. The court resolved this question on the premise that punishment limits rights. With regard to the death penalty, the question was whether the objective of the penalty, which may be deterrence or retribution, is a reasonably justified restriction on the right to life. The court answered in the negative;
- ii. Whether the limitation is necessary and reasonably connected with the achievement of the objective. The court answered this in the negative citing empirical studies that suggested that the death penalty did not necessarily deter capital offences; and
- iii. Whether the objective can be achieved through means that are less damaging or less intrusive of rights. Here, the court held that the requirements of retribution can be satisfied by long term incarceration without terminating other rights.¹³¹

¹³⁰ The substantial difference between the 1996 Constitution and the Interim Constitution is that the former excludes the requirement that a limitation on any right must not negate the essential content of the right. Section 33(1) of the Interim constitution provides as follows:

The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-

- a. shall be permissible only to the extent that it is-
 - i. reasonable; and
 - ii. justifiable in an open and democratic society based on freedom and equality; and
- b. shall not negate the essential content of the right in question, and provided further that any limitation to-
 - i. a right entrenched in section 10, 11, 12, 14 (1), 21, 25 or 30 (1) (d) or (e) or (2); or
 - ii. a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.

¹³¹ According to Chaskalson P, 'the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality... Proportionality calls for the balancing of different interests. In the balancing process, the relevant considerations are the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such society; the extent of the limitation, its efficacy and particularly, where the limitation is necessary, whether the desired ends can reasonably be achieved through other means less damaging to the right in question. In the process, regard must be

In sum, the balancing process involved in the proportionality test must also be predicated on respect for the rights and values protected by the constitution.

Generally, sentencing decisions have followed the principles enunciated in *Makwanyane*. The ensuing pattern tilts toward balancing or achieving the objects of punishment with no more severity than is necessary. The pattern also portrays sentencing decisions as imbibing parsimony in proportionality analyses. In *NDPP v Kleinbooi and others*,¹³² the court endorsed Hoexter's¹³³ views regarding the proportionality test in administrative law. Hoexter had explained that proportionality avoids 'an imbalance between ... adverse and beneficial effects...' It requires a public administrator to ponder and use a 'less drastic or oppressive means to accomplish [a] desired end'.¹³⁴ Relying on this view, the court held that sentencing entails juxtaposing the adverse effects that punishment would have on the offender on one hand and the public good that would arise from the punishment on the other. It requires pondering what type of punishment was needful and deciding on a measure that protects the public interest without employing more severity than is necessary.

Of course, this is only a general principle. How the ingredients mix in a proportionality analysis will differ on a case by case basis. Also, the outcome of the test depends on which object or interest the court perceives to be dominant. Thus, it is not necessarily the case that two similar criminal cases will receive the same punishment. Sentencing outcomes are influenced by a range of subjective features that must be taken into consideration and by penal sanctions that have been tailored in specific legislation to achieve specific objects.

Crimes that are prosecuted under the Prevention of Organized Crime Act 121 of 1998 (POCA) illustrate the nuances of the proportionality test. POCA is South Africa's response to the social malaise presented by organized crimes. It prescribes forfeiture of criminal assets and proceeds of crime for offences committed under the Act. Whether a property is liable to forfeiture depends on whether it was used as an instrumentality of the prohibited acts (that is,

had to the provisions of section 33(1), and the underlying values of the Constitution...' See *S v Makwanyane* supra note 32 at 43 paras D-G.

¹³² [2008] 2 All SA 455 (C).

¹³³ Cora Hoexter *Administrative Law in South Africa* (2007) 309.

¹³⁴ Ibid.

used to perpetrate crimes), or is the proceeds of such activities. Forfeiture applications have been subjected to robust proportionality tests, directed at determining whether the deprivation of property, the ownership of which is constitutionally protected, is commensurate with the public interests that POCA seeks to protect. In *Mohunram and Another v National Director of Public Prosecutions and Others*,¹³⁵ the Constitutional Court laid out the following proportionality test:

1. A forfeiture proceeding must keep the main purposes of POCA in view. These purposes are essentially targeted at combating organized crimes because they endanger significant public interests.
2. It must sufficiently connect the property to the main purpose of POCA. In other words, it must be demonstrated that the property was the instrumentality of the offence in question. This means that the forfeiture must be evaluated against the primary purpose that the Act is intended to achieve. The more remote the offence is to the primary purpose, the more disproportionate an order of forfeiture would be.¹³⁶
3. The effect that forfeiture would have on the owner of an interest in the property – regardless of his blameworthiness – must also be put into consideration. Also, the property in question must not be subject to other asset forfeiture provisions that would make forfeiture under the Act twice punitive. Here, *Mohunram* noted that courts have consistently and correctly applied a standard of proportionality that ensures that forfeiture orders under POCA do not result in arbitrary deprivations of property or in cruel, inhuman or degrading punishment.¹³⁷

¹³⁵ 2007 (6) BCLR 575 (CC).

¹³⁶ The requirement entails that forfeiture must ‘substantially serve[...] the purposes of the Act’. See *NDPP v Van der Merwe and Another* 2011 (2) SACR 188 (WCC) at 208I.

¹³⁷ *Mohunram and Another* supra note at 135 paras 118-127; see also *Prophet v National Director of Public Prosecutions* 2007 (2) BCLR 140 (CC) where the Constitutional Court held at para 58 that the test of proportionality ‘[weighs] the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence’. However, see further *NDPP v Vermaak* 2008 (1) SACR 157 (SCA), where it was held that the POCA also applied to individual crimes. The case found that the car that the respondent drove when she was arrested for driving under the influence of alcohol, was an ‘instrumentality’ for the commission of the offence, in terms of POCA. However, having regard to the nature of forfeiture as a remedial measure, primarily, or as serving to inhibit the continuance of an ongoing criminal activity, forfeiture in the present case was not justified. The court came to this conclusion because the ordinary criminal remedies were adequate to deal with the crime.

The same principles were utilized in *NDPP v Van der Merwe and Another*,¹³⁸ where the court held that its decision to issue an order of forfeiture – which is penal in effect – was dependent on whether forfeiture was, in the instant case, the ‘rationally and proportionately appropriate manner of achieving the ends of the Act’.¹³⁹ Forfeiture should not under any guise result in an arbitrary deprivation of property – such as when it leaves the owner homeless – as that would be disproportionate to the objects of POCA. Another consideration of proportionality is whether the property in question had a functional – rather than incidental – role in the commission of the crime, or was proceeds of the crime.¹⁴⁰ However, considerations of the punitive effect of forfeiture should not outweigh the imperative of realizing the objects of the Act; whether a forfeiture application is granted or denied must be predicated on realizing the aims of the legislation:

The effect of the forfeiture on the owner, while an important consideration, is but one of the relevant factors to be taken into account in the proportionality enquiry; it falls to be weighed in the balance with all the other factors that are relevant on the evidence in the case. The realisation of the objects of the statute therefore also demands proper consideration in the proportionality enquiry.¹⁴¹

Applying the proportionality principle may yield varied outcomes, depending on the nature of the crime, the objective that the penal statute sets out to achieve and the personal and subjective elements in each case. Thus, in *Van der Merwe*, the high court reversed the decision of the court *a quo* not to issue forfeiture order, having found on appeal, that it served the public interest in POCA, to order forfeiture.¹⁴² On the other hand, in *Mohunram*, the court found that forfeiture, in addition to other punishments that had been imposed on the first applicant, exceeded what would have been a proportionate penalty. The test of proportionality may also influence the type of punishment that is imposed. For example, in *S v H*¹⁴³ custodial sentence was said to be disproportionate where no legitimate public interest is at stake.

¹³⁸ Supra note 137 at 198 paras C-E.

¹³⁹ Ibid at 198 para D.

¹⁴⁰ Ibid at 194 para B-195 para B.

¹⁴¹ Ibid at 212 paras E-F.

¹⁴² The court found that issuing a forfeiture order was not disproportionately punitive, because the livelihood or shelter of the owner was not threatened thereby. See pages 211-212 of judgment.

¹⁴³ 1995 (1) SA 120 at 129 paras D-H.

The need to avoid overemphasising the personal circumstances of the offender, while underemphasising the seriousness of the crime, should also be uppermost in the court's contemplation.¹⁴⁴ This would entail finding a fair balance between mitigating and aggravating factors. The proportionality test must accord proper cognizance to mitigating factors, without rendering aggravating factors impotent. However, how courts have dealt with forfeiture under POCA is noteworthy. It shows that proportionality is complemented by the parsimonious consideration of ensuring that forfeitures do not visit unnecessary severity on the defendant, as that could amount to cruel and inhuman punishment. This judicial approach reinforces Von Hirsch's views discussed in chapter two, that proportionality and parsimony are consistent principles.¹⁴⁵

4.4 Sources of Normativity in Nigeria's Sentencing System

Like South Africa, the sources of normativity are essentially three: the Constitution; legislation and judicial interpretations.

4.4.1 The Constitutional Framework

A dominant feature in the normative framework for punishment in Nigeria is what this research considers to be the rather inadequate attention that the 1999 Constitution gives to the subject. To lay the foundation for discussing the framework, it must be acknowledged that the Constitution enshrines the principle of legality in the criminal law, under s 36(8) & (12). There are three elements to the principle as it appears in the provision. First, a person may not be convicted for an act or omission that was not a criminal offence under any written law at the time of the act or omission. Secondly, the penalty for the offence must be prescribed by written law, and thirdly, no penalty shall be imposed that is heavier than the penalty that was in force at the time of the act

¹⁴⁴ *Opperman and Another* supra note 100; in this case, the court reasoned that substituting the sentence that was imposed by the high court for a lesser sentence would 'overemphasise the appellants' personal circumstances and underemphasise the seriousness of the rape'.

¹⁴⁵ See chapter 2 section 2.4.

or omission.¹⁴⁶ These requirements – or the principle they enshrine – formed the basis for abolishing customary criminal law in Nigeria.¹⁴⁷

There are also protections for human dignity under s 34(1) of the Constitution. Paragraph (a) thereof guarantees every individual respect for the dignity of his or her person and prohibits ‘torture, or ... inhuman or degrading treatment’, amongst other forms of treatment it considers adverse to human dignity. However, unlike Nigeria’s first two Constitutions, the 1999 Constitution omits ‘punishment’ from the phraseology of its human dignity clause.¹⁴⁸ The omission raises pertinent questions. Why were protections against inhuman or degrading punishments dropped from latter versions of the Nigerian Constitution? Does this mean that the Constitution no longer guarantees protection against such punishment? Or, does the protection against inhuman or degrading treatment extend to punishment?

An intuitive response to these questions could be that the word ‘treatment’ is elastic enough to include criminal punishment. In other words, the ambit of s 34(1)(a) extends to inhuman or degrading punishment. Indeed, this seems to be the way that Nigerian courts have approached the ‘application’ of the provision, as will be demonstrated in the cases reviewed below. It is also the manner that it is been approached in scholarly work. A 2010 doctoral dissertation¹⁴⁹ gave attention to explaining the human dignity clause in Nigeria’s 1999 Constitution. It placed reliance on the definition of torture in Article 1 of the International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in order to illustrate that ‘torture’, ‘cruel’, ‘inhuman’ and ‘degrading treatment or punishment’ differentiated between intensities in state-inflicted suffering and how to evaluate the state’s use

¹⁴⁶ Okwonkwo & Naish op cit note 5 at 41; s 36(8) of the 1999 Constitution states that ‘No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed’. Section 36(12) of the Constitution also states that ‘... a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law. See *Malizu v Commissioner of Police* (1978) 2 LRN 252 CA at 256, where the court of appeal described a sentence imposed by the trial court as an ‘illegal sentence’ because it ‘was not a sentence according to law’.

¹⁴⁷ See discussion on this in section 3.4.2 above.

¹⁴⁸ The corresponding provision in the repealed 1979 Constitution is similarly worded.

¹⁴⁹ Livinus Ifeanyichuku Uzoukwu *Constitutionalism, Human Rights and the Judiciary in Nigeria* (Unpublished PhD Thesis, University of South Africa, 2010) 95-104.

of such suffering. However, the dissertation failed to pay attention to Article 1's exclusion of 'pain or suffering arising only from, inherent in or incidental to lawful sanctions' – a description that apparently excludes judicial punishment - from the scope of its definition of torture.

The thesis also cited the decision of Nigeria's Court of Appeal in *Ozoukwu v Ezeonu II*¹⁵⁰ where the court engaged in a careful exercise of defining the key words in s 31(1) of the 1979 Constitution (corresponding to s 34(1) of the 1999 Constitution). The key words in the provision are torture, inhuman and degrading treatment, slavery and servitude. Tobi JCA, as he then was, defined 'dignity' to mean 'being degraded at least in one's exalted estimation of his social status or societal standing', and 'torture' to mean subjecting "a person to some form of pain which could be extreme' or 'to some form of anguish or excessive pain'. Such acts could involve physical brutalization or mental torture that impairs a person's ability to think and act rationally. His Lordship also defined 'inhuman' to mean treatment that is barbarous, or uncouth, or cruel, lacking in human feeling on the part of the inflictor; and 'degrading treatment' to mean treatment that lowers a person's social standing, value, or character. Slavery and servitude were held to mean the condition of being enslaved, or of being subjected to 'irksome conditions like a slave'.

What the court clearly did not do in *Ozoukwu* is explain how the interpretation it offered extended to punishment. Yet the dissertation relied on these definitions to suggest that punishment that is unduly excessive length or severity, or disproportionate having regard to the seriousness of the offence may be torture. Clearly, Article 1 of the Torture Convention refutes such an imputation. Further, the dissertation cited authorities to the effect that 'punishment that is totally out of tune with contemporary society may be regarded as being offensive to human dignity' or that inflicting punishment selectively or discriminatorily may be 'cruel or amount to torture'.¹⁵¹ That may well be, but the basis for extrapolating conduct that fall under the definition of torture under the Convention against Torture to instances of judicial punishment has a weak or non-existent jurisprudential basis. Having conflated treatment and punishment, the dissertation went on to discuss how convicted offenders are subjected to inhuman prison

¹⁵⁰ (1991) 6 NWLR (Pt 200) 708.

¹⁵¹ See *Uzoukwu* op cit note 150 at 96-7.

conditions post-sentence, as if this in itself, were an example of judicial sentences that violate human dignity protections.

The application of s 34(1) of the 1999 Constitution to judicial punishment has taken place without a proper elucidation of the text of the provision. In the development of Nigeria's constitutional jurisprudence and scholarship, this omission of 'punishment' from the text of the human dignity clause in the 1979 and 1999 Constitutions appears to have gone unnoticed when Nigeria changed Constitutions.¹⁵² The omission and the fact that it has gone largely unnoticed in application of the clause under the 1999 Constitution,¹⁵³ raise the question regarding what the actual intention of the drafters of the Constitution is. It is a valid question: the argument has been made that the recognition of the right to life and the death penalty is a contradiction in Nigeria's Constitution.¹⁵⁴ Could the drafters of the Constitution have dropped 'punishment' from the human dignity clause in order to foreclose the death penalty or other statutory penalties from being contested as inhuman and degrading? The 1979 and 1999 Constitutions were both bequeathed by military administrations, in what could be said to be consistent with the political rationality of a dictatorial regime that invented different forms of harsh punishment to exert maximum control. Could this have had anything to do with the how the clauses in both Constitutions were framed?

Unfortunately, answers to the above questions may not be easy to come by, but they suggest that it may not be jurisprudentially right to assume, in the context of the evolution of Nigeria's constitutional and penal jurisprudence, that treatment also connotes judicial sentence or criminal punishment. A comparison of human dignity clauses and their interpretation in other Constitutions could be further damaging to the assumption that treatment also connotes punishment in Nigeria's 1999 Constitution.¹⁵⁵ For example, the provision of the South African

¹⁵² The researcher did not find any judicial decisions from Nigeria that treat the subject.

¹⁵³ See for example, *Onuoha Kalu v The State* [1998] 13 NWLR 531. This case is the *locus classicus* on the death penalty in Nigeria. It is discussed below.

¹⁵⁴ Onyekachi Wisdom Ceazer Duru 'The constitutionality of the death penalty under Nigerian law' (2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142981, accessed 25 March 2014.

¹⁵⁵ On this point, Nigeria's National Human Rights Commission offered an interpretation that suggests the provision applies to torture or other maltreatment at the hand of state officials or agencies who act in non-judicial capacity, in furtherance of their administrative responsibilities. The report interprets the constitutional provision in the light of the United Nations Convention Against Torture discussed below, so this may have informed why it narrowed its

Constitution that corresponds to the Nigerian provision is s 12(1)(e). It prohibits ‘cruel, inhuman or degrading treatment or punishment’. The Zimbabwean¹⁵⁶ and Namibian¹⁵⁷ Constitutions contain provisions similar to the South African Provision. According to the Supreme Courts of Zimbabwe and Namibia, the words ‘cruel, inhuman or degrading treatment or punishment’ must be construed disjunctively, meaning cruel, inhuman or degrading treatment is to be differentiated from cruel, inhuman or degrading punishment. The adjectives and nouns are capable of further combinations, producing phrases like cruel treatment, inhuman treatment, degrading punishment, etc. This interpretation essentially separates treatment from punishment; indeed, it contemplates ‘punishment’ as a judicial sentence, a distinction that the Zimbabwean Supreme Court affirmed when it reasoned that ‘treatment has a different connotation from punishment’.¹⁵⁸ However, treatment and punishment may sometimes be conflated, as the concurring opinion in Namibian Supreme Court case of *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State*¹⁵⁹ appeared to have done. Such conflation and the confusion that may arise from it ought to be avoided because ‘treatment’ and ‘punishment’ are fundamentally different concepts, as will

attention to treatment per se. See National Human Rights Commission *The State of Human Rights in Nigeria* (2007) Ch 2, available at <http://www.nigeriarights.gov.ng/resources>, accessed 12 April 2014.

¹⁵⁶ Section 15(1) of the 1980 Constitution of Zimbabwe provides that ‘[n]o person shall be subjected to torture or to inhuman or degrading punishment or other such treatment’. The 1980 Constitution has been replaced by the Constitution of Zimbabwe Amendment (No. 20) Act, 2013. Section 53 thereof provides that ‘no person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment’. The right to respect and protection for one’s inherent dignity is provided for in section 51.

¹⁵⁷ Article 8 of the Constitution of the Republic of Namibia provides that ‘[t]he dignity of all persons shall be inviolable’ and that ‘[i]n any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed’. Section 8(2)(b) provides that ‘[n]o persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment’.

¹⁵⁸ See *S v Ncube, S v Ntshuma, S v Ndhlovu* 1988 (2) SA 702 (ZS) at 715C-D, where the Zimbabwean Supreme Court held that s 15(1) of the 1980 Zimbabwean Constitution ‘places prohibitions against (i) torture; (ii) inhuman punishment; (iii) degrading punishment; (iv) inhuman treatment; and (v) degrading treatment’. Thus, the court differentiated treatment from punishment. However, it observed that treatment could also connote the circumstances under which an imposed sentence is served. Thus, the conditions under which a prison sentence is served could be described as cruel, inhuman, or degrading treatment, while punishment would specifically refer to the range of penalties that a court may impose. In *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State* 1991 Nr 178 (Sc) at 187 paras G-H, the Namibian Supreme Court also construed the prohibition disjunctively. According to the court, ‘it seems clear that the words ... [torture or to cruel, inhuman or degrading treatment or punishment] have to be read disjunctively. Thus read, the section seeks to protect citizens from seven different conditions [namely]: (a) torture; (b) cruel treatment; (c) cruel punishment; (d) inhuman treatment; (e) inhuman punishment; (f) degrading treatment; [and] (g) degrading punishment.’

¹⁵⁹ Supra note 158. Berker CJ at 192I-193A of the judgment directed his mind to considering whether corporal punishment ‘amount[ed] to cruel, inhuman or degrading treatment within the meaning of art 8(2)(b)’.

be shown shortly. The majority's approach in *Ex Parte Attorney-General*, of interpreting the words disjunctively ought to be taken as the authoritative statement on the subject.¹⁶⁰

In *S v Williams*,¹⁶¹ South Africa's Constitutional Court followed these precedents as well as the jurisprudence of the European Court of Human Rights which treated punishment as a judicial sentence. The court also relied on decisions of the United States Supreme Court in *Forman v Georgia*¹⁶² and *Gregg v Georgia*,¹⁶³ to the effect that the preservation of human dignity underlies prohibitions against 'cruel and unusual punishments' under the United States Constitution. At issue in the American cases was whether the death penalty violated the Eighth¹⁶⁴ and Fourteenth¹⁶⁵ Amendments to the United States Constitution. In *Gregg v Georgia* particularly, the court held, relying on *Furman v Georgia* and a host of its other decisions, that since the death penalty was recognized in the Fourteenth Amendment, the penalty, notwithstanding prohibitions of cruel and unusual punishments under the Eighth Amendment, did 'not invariably violate the [C]onstitution', [or] 'was not invalid *per se*'.¹⁶⁶ The death penalty was not *ipso facto* a 'cruel and unusual punishment' within the meaning ascribed to those words by the Eight Amendment. That is, it did not violate 'the Constitutional concept of cruelty'.¹⁶⁷ However, the court did acknowledge circumstances under which the penalty would infringe the

¹⁶⁰ In South African jurisprudence, the adjectives in the prohibition against being 'treated or punished in a cruel, inhuman or degrading way' are also disjunctively construed. See *S v Dodo* supra note 100 at 403 paras B-D.

¹⁶¹ 1999 (3) SA 632 at 639 paras A-E & 640 para J- 641 para D; the Constitutional Court observed that international law jurisprudence associated prohibitions of cruel, inhuman or degrading treatment with the prohibition of torture. It noted definitions by the European Commission on Human Rights, which describe inhuman treatment as treatment 'that causes severe suffering, mental or physical, which in the particular situation is unjustifiable' and view *torture* as 'an aggravated form of inhuman treatment'. On inhuman and degrading punishments however, the Constitutional Court resorted to the European Court's decision in *Tyrer v. The United Kingdom*, Application no. 5856/72 (decided on 25 April 1978), which generally regarded punishment as the aftermath of a judicial sentence. It is also noteworthy that the definition of torture under Article 1(1) of the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment excludes 'pain or suffering arising only from, inherent in or incidental to lawful sanctions'. Thus, any form of 'punishment' that is imposed outside compliance with a lawful order of court, such as a criminal sentence, would not be regarded as criminal punishment.

¹⁶² 408 U.S. 238.

¹⁶³ 428 U.S. 153.

¹⁶⁴ The Eight Amendment provides that 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'. See US Constitution online, available at <http://www.usconstitution.net/const.html>, accessed 22 July 2013.

¹⁶⁵ Paragraph 1 of the Fourteenth Amendment provides in part, that the state shall not deprive 'any person of life, liberty, or property, without due process of law'. See US Constitution online, available at <http://www.usconstitution.net/const.html>, accessed July 22 2013.

¹⁶⁶ *Gregg v Georgia* supra note 163 at 170.

¹⁶⁷ Ibid at 179.

Eighth Amendment.¹⁶⁸ For instance, punishment would be cruel if the means by which it was carried out employed ‘unnecessary and wanton infliction of pain’, or the punishment was ‘grossly out of proportion to the severity of the crime’.¹⁶⁹ These considerations, the court held, constitute the overarching principles of punishment and may be moderated by ‘evolving standards of decency’ as society progresses towards maturity.¹⁷⁰

An argument could be advanced that even if the Constitutions of Namibia, South Africa and Zimbabwe had not used the words ‘treatment’ and ‘punishment’ in their respective human dignity clauses but only used ‘treatment’, the courts could still have found treatment elastic enough to mean punishment. It would difficult to imagine what the courts would done in that circumstance, but one would at least expect that the courts would elaborate a careful textual, contextual and purposive justification to why treatment should also mean punishment in the context of their respective Constitutions, as they have done with the extant texts. In Nigeria, courts have not offered such rationalisations in connection with s 36(1) of Nigeria’s 1999 Constitution and its 1979 forebear. Indeed, it does not also appear that they have been alert to the textual differences in the foreign Constitutions they have referred to on the matter and how the courts in those countries interpreted the texts. But perhaps one may excuse this. Real opportunities to do so have been few, and emerged from constitutional challenges to the death penalty. As noted above, in *Onuoha Kalu v The State*,¹⁷¹ Nigeria’s Supreme Court held that the death penalty did not violate the human dignity clause in Nigeria’s 1979 Constitution. The court presumed that ‘inhuman or degrading treatment’ in s 31(1)(a) of the Constitution (s 34(1)(a) of the 1999 Constitution), meant inhuman or degrading punishment. It made no attempt whatsoever to inquire into what ‘inhuman or degrading treatment’ meant within the context of Nigeria’s Constitution, or inquire into the nature of protections intended by the provision. The court ought to have made that enquiry and examined the historical context of the provision, as the South African Constitutional Court did in *Makwanyane*. The Court also ought to have paid particular

¹⁶⁸ Ibid.

¹⁶⁹ Ibid at 170 – 183, but see particularly pages 170, 179, 183.

¹⁷⁰ Ibid at 173-174.

¹⁷¹ Supra note 153. See where case was briefly discussed in section 2.3.

attention to the fact that Nigeria's first two Constitutions¹⁷² contained specific prohibitions against cruel, inhuman and degrading punishments, which were tellingly excluded by the military administrations that bequeathed the latter Constitutions. Alas, the court missed the opportunity for a textual, contextual and purposive analysis of the Constitution's human dignity clause.¹⁷³

A more recent opportunity to interpret the phrase arose in the Supreme Court case of *Joseph Amoshima v The State*,¹⁷⁴ which also dwelt on whether the death penalty could be classified as an inhuman and degrading treatment, and hence constitutionally prohibited. In order to prompt the court to resolve this question, the appellant raised an issue as to whether having regard to the adjudicatory powers conferred on the court under s 6 of the 1999 Constitution, a statutory mandatory penalty did not violate the constitutional doctrine of the separation of powers. It was a very pertinent question as it challenged the court to determine whether its discretion could be fettered by a mandatory statutory penalty that potentially impedes the court's ability to do justice, having regard to the circumstances of the case. Unfortunately, the court missed the point, turning instead, its attention on the constitutionality of the death penalty and offering a very restrictive view of the separation of powers. Accordingly, the court affirmed that the death penalty could not be said to be inhuman or degrading treatment within the meaning ascribed to the word under the constitution. This would suggest that the penalty was not disproportionate to the crime of robbing with a firearm. Regardless of the circumstances of the crime, courts were obligated to apply the penalty. Secondly, the court held that a legislature acts

¹⁷² The argument has been advanced that neither the 1960 nor 1963 Constitutions of Nigeria were autochthonous, because both (though the later was indirect) derived from imperial authority. Notwithstanding colonial antecedents that may challenge the democratic credentials of both Constitutions, it may be contended that both were adopted after a democratic process in which citizens freely participated. This is very much unlike the 1979 and 1999 Constitutions, which though autochthonous, were essentially decreed by military administrations. See BO Nwabueze *Military Rule and Constitutionalism* (1992) 341-349; Helen Chapin Metz 'Nigeria: A country study' in Martin P Mathews (ed) *Nigeria: Current History and Historical background* (2002) 81 at 107. For a history of Nigerian Constitutions, see BO Nwabueze *A Constitutional History of Nigeria* (1982).

¹⁷³ The court came to these conclusions after reviewing a host of foreign decisions, including *S v Makwanyane* supra note 32. The court's failure to interpret s 34(1)(a) may be attributed to the narrow approach that was adopted on the question of the constitutionality of the death penalty. Had the question been raised for instance, whether the death penalty was proportionate to the crime for which the accused was charged, the court might have considered whether the proportionality principle could be a basis for determining the constitutionality of any number of statutory penalties in Nigeria. It may also have considered the meaning and adequacy of protection provided by s 34(1)(a).

¹⁷⁴ (2011) LPELR-SC.283/2009.

within the ambit of its constitutional obligation when it enacts a mandatory penalty and that courts had no discretion with regard to such penalties (to entertain questions, for instance, as to whether or not the penalties are proportionate). According to Fabiyi JSC, there are no escape routes where such legislation is involved.¹⁷⁵ In effect, *Amoshima* enunciated the principle that no separation of powers doctrine is violated when the legislature decides that courts will not exercise discretion in sentencing.¹⁷⁶ This principle unduly whittles down the constitutional powers of courts to censure statutory penalties that are unduly disproportionate. It is contrary to the position in South African, where courts have vigorously opposed mandatory sentences that impose limitations on judicial discretion.¹⁷⁷

Even though the Supreme Court adopted a rigid position in *Amoshima*, it is noteworthy that it acknowledged ‘that the death penalty may be ... degrading...’.¹⁷⁸ The statement may indicate a judicial softening of posture on the issue, or the court’s openness to foreign jurisprudence that associate the death penalty with human dignity violations. It may also indicate that the court may not be very averse to its abolition.¹⁷⁹ Similar sentiments were expressed in 2014 by the Court of Appeal in *Alaba Olagunju v The State*¹⁸⁰ when Sotonye Johnson-West JCA said he ‘would ... seek for the ... death sentence to be commuted to life imprisonment ... in line with global trends ... which has seen to the abolishment of the death sentence statutes in many climes’. He said further that ‘it is enshrined in the Universal Declaration of Human Rights that everyone has ... [a] right to life, even those who commit murder; sentencing a person to death ... violates that right’. However, the death sentences in both cases were upheld. In *Amoshima* particularly, the court held that the punishment cannot be said to be degrading or cruel when it is recognised by law. A constitutional amendment may therefore be necessary before the penalty can be regarded as a degrading violation of the right to life, and for judicial sentiments that have been expressed against the penalty to crystallise into mainstream jurisprudence on the subject in

¹⁷⁵ Ibid.

¹⁷⁶ See also *Okoro v State* (1998) 14 NWLR 584, where the Supreme Court held that the death sentence and its method of execution are sanctioned by ss 33(1) and 34(1)(a) of the 1999 Constitution.

¹⁷⁷ See Van Zyl Smit op cit note 14 at 49-11 – 49-17.

¹⁷⁸ *Amoshima v The State* supra note 174 at 10-11.

¹⁷⁹ Ibid.

¹⁸⁰ LN-e-LR/2014/7 (CA). Sotonye Johnson West JCA expressed the same opinion in *Daniel Itodo v The State* LN-e-LR/2014/51 (CA).

Nigeria. The same would apply to other forms of punishment that offend human dignity, because they are inherently offensive or grossly disproportionate. However, until a constitutional review of punishments happens, judges, lawyers and legal scholars must find innovative ways to advance protections for human dignity in the context of sentencing.

A way to start this is to adopt the reasoning advanced in the American cases discussed above and to begin interrogating whether the methods of executing a judicial sentence, or the proportion between crime and punishment, are consistent with human dignity protections under the Nigerian Constitution. Several penal laws in Nigeria provide a basis for such enquiry; the criminal codes in Northern and Southern Nigeria recognize corporal punishments,¹⁸¹ while the twelve Nigerian states¹⁸² that operate sharia criminal codes have added amputations and death by stoning to the list for offences like stealing, adultery and rape. The development regarding sharia poses two challenges. One, and if one assumes that the protection afforded human dignity by the Nigerian Constitution is vague and imprecise, sharia institutionalizes punishments that may violate Nigeria's international human rights obligations. Secondly, it institutes a discriminatory system of punishment, as it purports to subject a section of the Nigerian population to a harsher penal regime. Besides sharia however, the number of statutory offences for which the death penalty can be imposed has increased, following the adoption of kidnapping laws in some states in Nigeria.¹⁸³ Any challenge against the death penalty under these laws has to question whether the penalty is proportionate to the crimes in question. Hypothetically, and to use the judicial reasoning in the *Gregg* case,¹⁸⁴ it may be argued that the manner in which such a challenge may be resolved may depend partly on whether the crimes fall within the degree of gravity that has

¹⁸¹ See s 17 of the Criminal Code Act Chapter 77 Laws of the Federation of Nigeria 1990 and s 68 of the Penal Code Law.

¹⁸² There are 36 states in Nigeria. The states that have adopted Sharia law are 12 in number. They are states where Muslims claim dominance.

¹⁸³ On this subject, see Peter A. Anyebe, 'Sentencing in criminal cases in Nigeria and the case for paradigmatic shifts' *NIALS Journal of Criminal Law and Justice* Vol. 1 (2011) 151-196 at 160-161; the researcher notes that the Kano State Sharia Penal Code 2000 creates offences that are punishable by the death sentence. In the southern states of Abia, Imo and Akwa Ibom States, kidnaping is punishable by death. In Enugu and Rivers states, crude oil theft and crude oil bunkering are punishable with death.

¹⁸⁴ In *Gregg v Georgia* supra note 163 at 177, the Supreme Court of the United States of America held that imposing the death penalty for the crime of murder had a history of acceptance and precedent in American society that strongly negated a constitutional challenge that it violated the Eighth Amendment. It follows that the cruelty that the Constitution forbade is the cruelty of the method of executing the death penalty,

been traditionally regarded as warranting the imposition of the death penalty in Nigeria.¹⁸⁵ A second approach, which is discussed in section 4.4.3 below, would challenge methods of execution that are inherently painful as to suggest a disproportionality that goes against the core of protections for human dignity.¹⁸⁶

4.4.2 Punishment and Human Dignity: The African Charter as a Probable Normative Basis

The African Charter on Human and People's Rights 1981 (the Charter) goes further than the Nigerian Constitution in securing the right to human dignity. In 1983, Nigeria domesticated the Charter by enacting the African Charter on Human and People's Rights (Ratification and

¹⁸⁵ On this account, the sentencing by sharia courts, of two Muslim women, Safiya Hussaini and Amina Lawal, to death by stoning following convictions for adultery can be said to be unconstitutional. The challenge may be on two grounds. First, the sentence is disproportionate to the alleged crimes, as the death penalty has never been traditionally imposed for such crimes in Nigeria. Secondly, the method of execution, which is by stoning, involves a cruel and potentially prolonged process. Unfortunately, the constitutionality of the sanction for the sharia law crime of adultery has not been subjected to judicial determination. The convictions and sentences for Hussaini and Lawal were eventually quashed on technical grounds, in a process that Kamari Clarke has described as illustrating the internal capacity of sharia law to self-reform. What she did not consider however, is the question of the constitutionality of the death penalty for adultery. See Kamari Maxine Clarke *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009) 206-214. One could also argue, in relation to new kidnapping laws in Nigeria, that the capital sentence is grossly disproportionate, because it lacks a long history of acceptance and judicial precedent. See also United Nations Economic and Social Council, 'Civil and Political Rights, Including Religious Intolerance: Report of the Special Rapporteur of Freedom of Religion or Belief, Asma Jahangir – Mission to Nigeria' E/CN.4/2006/5/Add.2.

¹⁸⁶ *S v Dodo* supra note 99. What may have been a step in this direction was taken recently in an unreported case, when the applicants in *James Ajulu and Others v Attorney-General, Lagos State* Unreported Suit No. ID/76M/2008 of 29 June 2012, challenged the constitutionality of death penalty execution methods, namely hanging and the firing squad, which they argued were in violation of the constitutional prohibition of torture, inhuman or degrading treatment. The court was persuaded by the applicants' argument on this point, but relied on the wrong authorities to issue injunctions against the methods. Its reliance on the Supreme Court decision in *Peter Nemi v Attorney-General of Lagos State* (1996) 6 NWLR 587, was flawed, because the core issue in that case dwelt on the failure to carry out a death sentence eight years after it was imposed, and the detention of the appellant in inhumane prison conditions while the delay to execute the sentence lasted. Indeed, the court in *Ajulu* relied on obiter in *Peter Nemi* which queried whether executing a death sentence by a slow, cruelly painful method could be constitutional. Besides, the *Ajulu* decision overlooked a trail of Supreme Court authorities such as *Onuoha Kalu v The State* supra note 153 and *Okoro v State* [1998] 14 NWLR 181, where different justices expressed dicta on whether the method of execution could be challenged, with a majority of the panel in *Kalu* severally relying on foreign decisions that clearly determined that the death penalty and the method of executing it – referring specifically to hanging – could not be challenged where the Constitution reserved a qualified right to life. Further, the *Ajulu* decision perpetuates the error of assuming the prohibition against inhuman or degrading treatment applies to judicial punishment. In view of conflicting obiter, this researcher is of the opinion that the issue should have been referred to the Supreme Court of Nigeria through the referral process stipulated in s 259 of the 1979 Constitution (now section 295 of the 1999 Constitution).

Enforcement) Act.¹⁸⁷ The Act annexes the entire Charter, transforming its entire provisions into national law. The Act's legal status came under consideration in *Abacha and Others v Fawehinmi*¹⁸⁸ where Nigeria's Supreme Court affirmed the supremacy of the Constitution over the Act. With regards to other municipal legislation however, the Act will prevail in the event of a conflict. The court held that the Act's pre-eminence is guaranteed by the presumption that the legislature will not legislate in breach of an international obligation.¹⁸⁹

Article 5 of the Charter (as incorporated) affirms amongst others, the right to human dignity and prohibits '[a]ll forms of exploitation and degradation of man particularly ... torture, cruel, inhuman or degrading punishment and treatment...' The interpretation of the phrase by the African Commission on Human and Peoples Rights (the Commission) has been considerably influenced by the jurisprudence of the European Court of Human Rights. For example, in *Hurilaws v Nigeria*,¹⁹⁰ the Commission relied on the decision of the European Court of Human

¹⁸⁷ No 2 of 1983, Chapter A9, Laws of Federation of Nigeria 2004. By virtue of s 12 of the 1999 Constitution, treaties become enforceable in Nigeria only when they have been enacted into municipal law.

¹⁸⁸ (2001) AHRLR 172 (NgSC 2000).

¹⁸⁹ Ibid at para 15; almost in the same breadth, however, the court held that the validity of a domestic legislation is not 'necessarily affected by the mere fact that it violates the African Charter or any other treaty'. It relied on a United States decision in *Chae Chan Ping v United States* 130 U.S. 581 (1889) which held that treaties did not have 'higher dignity than Acts of Congress'. Given that a domestication statute and other Acts of Congress are enacted by the same body exercising sovereign legislative powers, the court must be presumed to mean that only those provisions of a domestic statute that violate the provisions of African Charter Ratification Act would be void. However, where the main object of the domestic statute or its entire provisions violate the Charter, the conflict would perhaps be resolved in a manner that is analogous to the situation under the English Human Rights Act, which permits an English court to declare a domestic law to be inconsistent with rights under the European Convention on Human Rights, without impeaching the validity or enforceability of the same. A declaration of inconsistency would then serve as an advice to parliament for legislative amendment. A legislature's response to such declaration could be to amend the local legislation to bring it into conformity with the treaty, but it may also repeal the domestication act, as the court pointed out in the *Abacha* case. However, as long as the inconsistency lingers, courts may be unable to issue more than declaratory reliefs. While there are no statutory provisions in Nigeria that have the same effect as these stipulations in the English Human Rights Act, the *Abacha* case may have the same effect. Indeed, the court acknowledged (obviously affirming Nigeria's legislative sovereignty) that a subsequent Act of the legislature may repeal the ratification law, in which case the presumption that the legislature would not legislate out of Nigeria's international obligation will be rebutted by an expressly worded legislative intention to do so. See Chinonye Obiagwu & Chidi Anselm Odinkalu, 'Nigeria: Combating legacies of colonialism and militarism' in Abdullahi Ahmed An-Na'im (ed.) *Human Rights under African Constitutions: Realising the Promise for Ourselves* (2003) 211-250; Edwin Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) Vol. 15 No. 2 *Journal of African Law* 249-284; Magnus Killander & Horace Adjolohoun 'International Law and domestic human rights litigation in Africa: An introduction' in Magnus Killander (ed.) *International Law and Domestic Human Rights Litigation in Africa*, (2010) 3-22 at 13-14. But see also A.O Enabulele 'Implementation of treaties in Nigeria and the status question: Whither Nigerian courts?' (2009) 12 *RADIC* 326.

¹⁹⁰ See Communication 225/98.

Rights in *Ireland v United Kingdom*, which interpreted a similar prohibition in the European Convention on Human Rights, to find that the detention of Mr Ifowodo and Mr Agbokoba by the State Security Service, and the treatment meted out to them while under detention, constituted a violation of the protection against cruel, inhuman or degrading treatment.

It must be noted that the focus in *Hurilaws v Nigeria* was the poor treatment meted out to the nominal complainants by state security services, rather than on judicial punishment. In its several other decisions, however, it does appear that the Commission has not maintained a particularly useful distinction between ‘punishment’ and ‘treatment’. Some of these decisions have rightly interpreted article 5 as applying to the treatment of prisoners or detainees during periods of incarceration (as the European Court has consistently done),¹⁹¹ and there have been instances where the Commission rightly extended the meaning of ‘treatment’ to the method of executing a death sentence.¹⁹² It does appear that one of the few complaints in which the Commission has dealt specifically with the prohibition against cruel, inhuman or degrading

¹⁹¹ In this regard, see decisions of the African Commission in the following Communications: Communications 27/89, 46/91, 49/91, 99/93 *Organisation Mondiale Contre La Torture and Association Internationale des juristes Democrates*) *Commission Internationale des Juristes (C.I.J) Union Interafricaine des Droits de l'Homme/Rwanda*; 64/92 *Krischna Achutan (On behalf of Aleke Banda)*; Communication 68/92 *Amnesty International on behalf of Orton and Vera Chirwa* 78/92 *Amnesty International on behalf of Orton and Vera Chirwa v. Malawi*; Communication 143/95, 150/96 *Constitutional Rights Project and Civil Liberties Organisation/ Nigeria*; Communication 151/96 *Civil Liberties Organization/Nigeria*; Communications 48/90, 50/91, 52/91, 89/93 *Amnesty International vs/Sudan, Comité Loosli Bachelard vs/Sudan, Lawyers Committee for Human Rights vs/Sudan, Association of Members of the Episcopal Conference of East Africa vs/Sudan*. See also Communication 279/03-296/05 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan*; Communication 266/03 *Kevin Mgwanga Gunme et al / Cameroon*.

¹⁹² This use emerged in Communications 54/91, 61/91, 98/93, 164/97 à 196/97, 210/98 *Malawi African Association vs/Mauritania*; *Amnesty International vs/Mauritania*; *Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO vs/Mauritania*; *Collectif des Veuves et Ayants-droit vs/Mauritania*; *Association that Mauritanienne des Droits de l'Homme vs/Mauritania*. One of the allegations was that three military officers convicted of involvement in a court plot were executed pursuant to a judicial order. Their execution was staged to ensure slow and cruel death. The Commission returned a general finding that the several allegations of ‘torture, cruel, inhuman and degrading treatment forms of treatment’ were established. However, it would have enhanced clarity on the subject if the Commission had made a specific pronouncement on the sentence itself, or the manner in which it was executed. Note also, the 2011 decision of the Commission in Communication 334/06 *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*. The Commission was asked to hold that the sentence of death by hanging, given the way it was implemented by Egyptian authorities, violated the prohibition against cruel punishments. The Commission made general findings that the alleged violation of article 5 had been proved and that there had indeed been violations, but it made no specific findings regarding death by hanging, the tortuous details of which the complainants had described. However, the Commission held the opinion that death penalty would not be an arbitrary deprivation of life if fair trial rights were guaranteed and the trial held before an independent judiciary.

punishment is *Curtis Francis Doebbler v Sudan*,¹⁹³ where it held that corporal punishments are acts of physical violence that amounted to ‘state sponsored torture’ and violated article 5 of the Charter. The Commission’s approach to interpreting this provision has relied on the principle that ‘cruel, inhuman and degrading punishment or treatment’ should be extended to confer ‘the widest possible protection against abuse...’¹⁹⁴

The Commission’s approach may be pragmatic, but it is not very jurisprudentially helpful. There is much more that the Commission can do to develop the meaning and protections afforded by article 5. At the moment, its jurisprudence on the provision is rudimentary. That is not to say that the Commission’s approach does not offer Nigerian courts guidance. At the least, it offers a principle for impugning punishments that have an intrinsic element of excessive force or pain.¹⁹⁵ However, greater clarity is needful.

4.4.3 Between the Constitution and the African Charter Ratification Act: Making the Human Dignity Protection More Meaningful

Notwithstanding the inadequacy of s 34(1)(a), there may yet be a way of reading a prohibition against inhuman and degrading punishment into the Nigerian Constitution. To start with, s 34(1) guarantees protection for human dignity, but leaves the content of the right open to interpretation. However, in paragraph (a) of subsection (1), the Constitution comes down to the specifics by excluding measures that amount to ‘inhuman and degrading treatment’ – amongst others – from the protection afforded by the human dignity clause. The listed prohibitions in s 34(1) are hardly exhaustive of measures that infringe the constitutional protection for human dignity. Human dignity is an important value; it has aptly been interpreted as the essence of the entire system of rights, or as finding expression in every right in a Bill of Rights.¹⁹⁶ This quality permits reliance to be placed on statutory enactments that contain more robust or more

¹⁹³ See Communication 236/200.

¹⁹⁴ Communication 225/98 *Hurilaws v Nigeria*.

¹⁹⁵ Examples will be corporal punishments under statutory and sharia criminal codes, and stoning to death and amputations under sharia.

¹⁹⁶ See Arthur Chaskalson ‘Dignity as a constitutional value: A South African perspective’ (2011) Vol. 26 No 5 *AM. U. INT’L L. Rev.* 1377-1407 at 1380-1385.

comprehensive protections for human dignity, such as the African Charter Ratification Act,¹⁹⁷ for the purpose of giving full meaning and expression to the constitutional intendment behind the protection of human dignity. Accordingly, the argument would be that the Ratification Act's prohibition of cruel, inhuman or degrading punishments is consistent with protections for human dignity under the Constitution. To foreclose such recourse would be so constrictive as to render the constitutional protection for human dignity largely ineffectual.¹⁹⁸

Support for this argument can be found in a number of judicial decisions that have applied the golden rule of statutory interpretation to constitutional provisions in Nigeria. The golden rule requires words in statutory provisions to be given their ordinary meaning, unless the words are vague, or a literal interpretation would cause an absurdity. The court may then refrain from applying the literal meaning and resort to other aids in order to reconstruct the true legislative intendment behind the legislation.¹⁹⁹ The rule is consistent with, or 'subsumed' by the purposive approach to interpretation.²⁰⁰ In a recent decision, *Mohammed Buba Marwa v Independent National Electoral Commission*,²⁰¹ the Nigerian Supreme Court relied on principles of interpretation that were developed in earlier decisions of the court. Three of these principles are particularly relevant to the present purpose. First, a constitutional provision is not to be interpreted in a way that 'defeats its evident purpose'; secondly, and beyond bland adherence to the literal meaning of words, the principles that undergird the provisions of the Constitution should 'measure the purpose and scope of its provisions'; and thirdly, 'the words of the constitution [should not] be read with "stultifying narrowness"'.²⁰² In essence, the language employed by the Constitution should be reasonably and purposively construed according to the

¹⁹⁷ Ibid at 1384-1385. It has been contended that human dignity is a vacuous unbounded concept that lacks a precise form or meaning. Nevertheless, judges – South African judges in particular - have consistently regarded the clause as providing a normative value system for interpreting constitutional provisions and developing the law.

¹⁹⁸ The United States Supreme Court decision in *Gregg v Georgia* supra provides persuasive authority for Nigerian courts to reject excessive punishments or punishments that apply inherently cruel methods, on the basis that they violate human dignity.

¹⁹⁹ Christo J Botha *Statutory Interpretation: An Introduction for Students* 4 ed (2005) 47; the author discusses the aids in two categories: secondary aids, comprising the long title to the statute and the headings of its chapters and sections; and where secondary aids are inadequate, tertiary aids, consisting of common law presumptions.

²⁰⁰ Andrew J Burger *A Guide to Legislative Drafting in South Africa* (2001?) 25-26.

²⁰¹ Unreported suit no. SC. 41/2011, SC.266/2011, SC.267/2011, SC.282/2011, SC.356/2011, SC.357/2011, available at <http://easylawonline.files.wordpress.com/2012/01/inec-28012012-2.pdf>, accessed August 8, 2013; the judgment was delivered on January 27, 2012.

²⁰² Ibid.

underlying principles of the Constitution. Absurd interpretations ought to be avoided.²⁰³ Upon this reasoning then, it may be contended that reading a prohibition against cruel, inhuman or degrading punishments into the Constitution's human dignity clause is consistent with the constitutional intent behind protections for human rights in the Bill of Rights and the Constitution as a whole. It avoids the absurdity of a Bill of Rights that is ineffectual against inhuman or degrading punishments.

The above argument is strengthened by a 2009 regulation, the Fundamental Rights (Enforcement Procedure) Rules,²⁰⁴ which calls on courts to 'expansively and purposely'²⁰⁵ interpret and apply the human rights guaranteed in the Constitution and the Ratification Act in a manner that is consistent with the international jurisprudence on the subject, and 'with a view to advancing and realizing the rights and freedoms' in the instruments, 'affording the protections intended by them'.²⁰⁶ Courts are to advance and not restrict rights, and may call in aid the provisions of 'municipal, regional and international bills of rights'.²⁰⁷ These are very empowering statements. Through purposive interpretation, Nigerian Courts can give robust content to the Constitution's human dignity provision by affirming the prohibition of cruel, inhuman or degrading punishments to be consistent therewith. They may then assume jurisdiction to examine and override statutes that prescribe punishments that fit the epithets.

²⁰³ Ibid.

²⁰⁴ See Killander & Adjolohoun op cit note 189 at 16; see also Ebenezer Durojaiye 'Litigating the right to health in Nigeria: Challenges and prospects' in Magnus Killander & Horace Adjolohoun (eds.) *International Law and Domestic Human Rights Litigation in Africa* (2010) 149-171 at 159; author writes that Nigerian courts increasingly apply and enforce the African charter. According to Dakas, the Fundamental Rights (Enforcement Procedure) Rules 2009 'reinforces the imperative of comparative jurisprudence'. Nigerian courts should give effect to the rulings of international human rights bodies. See Dakas CJ Dakas 'Judicial reform of the legal framework for human rights litigation in Nigeria: Novelties and Perplexities' being an enlarged and updated text of an earlier invited paper delivered at a training organised by the national secretariat of the Nigerian Bar Association (NBA), at Osogbo, Osun State, on February 21, 2012.

²⁰⁵ Paragraph 3 of the Rules' preamble.

²⁰⁶ Ibid.

²⁰⁷ See generally the preamble to the Fundamental Rights (Enforcement Procedure) Rules 2009.

4.4.4 The Statutory Framework for Sentencing in Nigeria

Generally, and by virtue of ss 270, 300, 366, 435 and 436 of the Criminal Procedure Act,²⁰⁸ punishments that may be imposed by a court of law include forfeiture, restitution of stolen property, the death sentence, imprisonment, caning, fine and probation. The power to impose these punishments is subject to the provisions of any written law relating to specific offences. These laws include the Criminal and Penal Codes and a host of criminal statutes.²⁰⁹ A sentence of imprisonment with or without the option of fine is prescribed in most cases and prison sentences are with hard labour unless the court specifies otherwise.²¹⁰ That said, sentencing legislation in Nigeria offers a mixed regime of mandatory punishments, mandatory minimum punishments and maximum punishments. Mandatory punishments leave sentencers without discretion at all, and penal statutes that stipulate the death penalty or life sentence fall within this category.²¹¹ Some statutes prescribe a minimum²¹² or maximum punishment,²¹³ meaning a court may impose a penalty anywhere above the minimum, or somewhere below the maximum.²¹⁴ A court would ordinarily construe a maximum penalty as allowing discretion to impose any quantum of punishment up to the stipulated maximum.²¹⁵ Other provisions prescribe a range of minimum to maximum penalties below or above which a court may not impose sentence.²¹⁶ Although the Criminal Code does not specifically use the word ‘maximum’, s 17 of the Interpretation Act makes the penalties that are stipulated in the Code or other penal statute the

²⁰⁸ Chapter C41, Laws of the Federation of Nigeria 2004.

²⁰⁹ Anyebe op cit note 183 at 154-155.

²¹⁰ Under s 17(2)(b) of the Interpretation Act Chapter 192, Laws of the Federation of Nigeria 1990, a sentence of imprisonment shall be with hard labour, unless the court in its discretion decides otherwise. See section 377 of the Criminal Procedure Act Cap. In most cases, prison sentences are imposed. Where option of fine is included in the sentence, indigent offenders who cannot pay the fine serve the prison sentence.

²¹¹ Examples can be found in s 2 of the Robbery and Firearms (Special Provisions) Act No. 5 of 1984 as amended by Act No. 28 of 1986. A corresponding provision is ss 295 and 296(2) of the Lagos State Criminal Law 2011.

²¹² Section 303(1)(a) of the Penal Code prescribes not less than 14 years’ imprisonment for robbery of brigandage committed with deadly weapon, or the commission of which results in grievous hurt, or such an attempt to cause grievous hurt is made.

²¹³ Provisions of the codes generally allow courts to impose prison sentences that may extend to a particular specified limit. For example, s 365 of the Penal Code Law, Cap 89 Laws of Kano State prescribes life imprisonment or less for forgery of a public seal. The penal code law is *in pari materia* with the Penal Code Law of Northern Nigeria. See Okwonkwo and Naish op cit note 5 at 41.

²¹⁴ See s 2(3) of the Robbery and Firearms Act 1984 and s 296(1) of the Lagos State Criminal Law 2011; See also s 18 of the EFCC Act; See Okonkwo *Okonkwo and Naish on Criminal Law in Nigeria* (1980) 38

²¹⁵ See *Dada v Customs and Excise Board* 1982 (2) NCR 79 at 90-91.

²¹⁶ Section 2(1) of Robbery and Firearms Act 1984 prescribes a minimum of 14 years and maximum of 20 years for attempted robbery. Section 365 of the Penal Code Law of Kano State prescribes life imprisonment or less for forgery of a public seal.

maximum allowable, where minimum or mandatory sentences have not been specifically prescribed.²¹⁷

These penal provisions generally allow considerable sentencing discretion, subject of course to the court's sentencing jurisdiction. However, some qualifiers may be needful. First, and as seen already, discretion is absent where mandatory punishments are prescribed, and there are crimes, perhaps too many, for which extreme penalties like the death penalty or life imprisonment must be imposed. Unfortunately, such crimes have grown in number, as a result of the adoption of sharia penal codes – in parts of northern Nigeria – and laws that punish kidnapping with death.²¹⁸ For such crimes, some measure of sentencing discretion would have been desirable, if not necessary. Secondly, some minimum sentences are so steep that they render discretion almost redundant. They foreclose any meaningful judicial examination of the proportionality of the sentences. It is therefore with regard to statutory maximum sentences that Nigerian courts may be said to enjoy any meaningfully wide discretion. What remains to be seen however, is whether the wide discretion that Nigerian courts enjoy has facilitated the development of sound principles regarding proportionality and consistency.

4.4.5 Proportionality in Nigerian Sentences

As suggested in this thesis, there is a presumption of constitutionality regarding statutes that prescribe penalties, which impedes judicial inquiry into the question of the proportionality of especially severe punishments. Probably the clearest view about how Nigerian courts utilize the proportionality principle comes from *Godwin Josiah v The State*,²¹⁹ where the Supreme Court stated:

[J]ustice is not a one-way traffic. It is not justice for the appellant only. Justice is not even only a two-way traffic. It is really a three-way traffic – justice for the appellant ..., justice for the victim ... and finally justice for the society at large - the society whose social norms and values have been desecrated and broken by the criminal act complained of.

²¹⁷ Anyebe op cit note 183; the same can be said of the Penal Code in Northern Nigeria, in which most penalties are prescribed with the words 'punished with imprisonment for a term which may extend to ...'

²¹⁸ For example, the Lagos State Criminal Law 2011 has preserved and expanded the number of such crimes. States in south-south and northwest Nigeria have made kidnapping punishable with the death penalty. In Nigeria, sentences of death could be by hanging or firing squad.

²¹⁹ *Godwin Josiah v The State* (1985) 1 NWLR (pt 11) 125 at 141.

The quote succinctly states the triad as it ought to apply in Nigeria. The triad comprises the offender, his victim and the state. However, it is not quite obvious how Nigerian courts balance these interests. It is usual for judgments to strenuously justify conviction and devote a few lines to pronouncing the court's sentence.²²⁰ This is because trial courts are under no obligations to proffer reasons for the sentences they pronounce.²²¹ There is indeed no constitutional or statutory obligation to do so,²²² and questions about the constitutionality or proportionality of sentences, or regarding whether certain punishments violate human dignity under the Ratification Act, have not yet been effectively dealt with by the courts.²²³ As Okwonkwo and Naish²²⁴ observed, courts impose punishments 'because it is the traditional one for that type of offence' according to some legislatively predetermined tariff.

Such an approach to sentencing is unhelpful. The ability of appellate courts to do substantial justice in appeals against sentences is impeded when trial courts do not offer reasons for the sentences they impose. Thus, in *Ekpo v State*²²⁵ the Supreme Court could only assume that the high court imposed the statutory maximum because it thought that was it was mandatory.

²²⁰ Magistrates shoulder the majority of cases that are litigated in Nigeria, making 70% altogether. This could well be the statistic for criminal trials in Nigeria. See Tahir Mamman 'The Role of Magistrates in Perceptions about the rule of law and constitutionalism in Nigeria' (2008) Vol. 9 *Nigerian Law and Practice Journal* 1-12 at 1. In a published compendium of a magistrate's criminal judgments, about a sentence or two were devoted to pronouncing the punishment imposed by the court. In a couple of instances, the magistrate advanced deterrence as the basis of the imposed punishment, without elaboration. See Alfred Awala *The Nigerian Magistrate in Action* (2001). The judgments of superior courts sitting as trial or appellate courts reflect similar patterns. For sentencing decisions by high courts in Nigeria, see *Alao v Commissioner of Police* (1978) 1 LRN 8; for Court of Appeal decisions; For sentencing decisions by Nigeria's Court of Appeal, see *Olanipekun v The State* (1979) 3 LRN 204 FCA; *Price Control Bd v Ezema* 1982 (1) NCR 7 FCA (Although this judgment discussed sentencing discretion at some length, it did not determine whether the trial court exercised discretion judicially).

²²¹ *Ekpo v State* 1982 (1) NCR 34 SCN at 40 para 30-3.5.

²²² See for example, Part 28 of the Criminal Procedure Act. Section 278 of Lagos State's Administration of Criminal Justice Law 2011 makes a departure from the status quo. It requires that the sentencer record in writing his reasons for the sentence and his reasons for applying or not applying a non-custodial measure. However, this only applies to criminal trials in Lagos State. There are no corresponding requirements in the Criminal Procedure Act or in Chapter XXII of the Criminal Procedure Code Law applicable in the Northern States of Nigeria.

²²³ Under s 295 of the Lagos State Criminal Law 2011 for instance, the minimum sentence of 21 years is imposed for robbery and death sentence for armed robbery, regardless of whether the arm was used, or life was lost in consequence of the use of a lethal weapon. Most robbery offences prosecuted outside Lagos State are prosecuted under the Robbery and Firearms Act and the provisions and penalties are the same as in Lagos. The researcher has not come across any judicial pronouncements that have queried the proportionality of these penalties.

²²⁴ Okonkwo & Naish op cit note 5 at 43.

²²⁵ 1982 (1) NCR 34.

This was hardly a very informed approach.²²⁶ Discussing the paucity of judicial deliberations sentencing principles in Nigeria, Okwonkwo and Naish wrote:

In Nigeria.... discussions on the principles of sentencing are almost non-existent in the law reports. But were judges obliged to give reasons, a useful body of law might grow up on the subject, which in turn would stimulate debate about the principles and methods of punishment.²²⁷

Failure to explain the reasons for the sentence potentially infringes the defendant's fair trial rights and compromises his ability to defend or appeal a sentence. Although there have been cases where appellate courts reviewed sentences because they were excessive, or because the trial court failed to give adequate attention to factors that should have mitigated sentence,²²⁸ the reviews offered little in terms of systematically explaining how these factors enhance proportionality and consistency. Issues about sentencing are typically dealt with in a few lines or paragraphs.²²⁹

4.4.6 A New Approach to Sentencing in Nigeria

The inadequacy of the Constitutional provision regarding human dignity makes the Ratification Act about the most authoritative legislative statement on the relationship between punishment and human dignity in Nigeria. However, the impact of the Act has yet to be felt on the debate on punishment. It remains rather difficult to distil the principles that moderate how judges approach the aims of sentencing.²³⁰ More important, however, is the need for Nigerian courts to found their approach to sentencing on a regulating constitutional norm, much like their South African counterparts have done, and to rationalize the standards for measuring proportionality. Writing about Nigeria's sentencing practice, Okwonkwo and Naish observed that sentencing

... ought to be a rational process, in the sense that a sentence should be passed with a specific principle or principles in mind – retribution, or deterrence, or deterrence and just deserts, or rehabilitation, and so on – in the hope that the type of sanction chosen

²²⁶ See Okonkwo & Naish op cit note 5 at 44.

²²⁷ Ibid.

²²⁸ See *Lumous and Animashaun v Customs and Excise Board* 1983 (1) NCR 66; *Oyeneye v Commissioner of Police* 1983 (1) NCR 245; *Commissioner of Police v Oshifalujo* 1983 (1) NCR 307; see also *Ekpo v State* supra note 225.

²²⁹ See section 5.6 below for further discussion on how Nigerian courts offer reasons for their choice of penalties.

²³⁰ That is not to say that Nigerian courts have not evolved rules to guide discretion, though the rules are inadequate. The next chapter will discuss them.

will put the particular principle chosen, however roughly, into effect. The principle to be applied, and therefore the type of sentence to be given, may well vary according to the needs of each particular case.²³¹

This rationality is largely absent in Nigeria's sentencing process and this significantly diminishes the potential for individualizing punishment. One reason for this is the dominance that deterrence and retributivist values have over Nigeria's criminal codes. Even though the codes also recognize rehabilitative measures,²³² the underlying penal policy of the codes, bogged down by the colonial considerations that gave them birth, does not enhance these other measures.²³³ Entrenching deterrent and retributivist values in penal legislation has also normalised a decidedly punitive outlook among sentencers,²³⁴ which has hindered them from developing a well-reasoned approach to sentencing. This, together with the absence of appropriate legal training and facilities for implementing alternative sentences, have hindered constructive penal developments in Nigeria.²³⁵

Recently, ground breaking reforms were achieved in Lagos State in the South-West Nigeria when the state government enacted two laws – the Administration of Criminal Justice (Repeal and Re-Enactment) Law 2011 (ACJL)²³⁶ and Criminal Law of Lagos State 2011 (CL).²³⁷ The laws introduce sentencing alternatives, new principles and restorative elements to the

²³¹ Okonkwo & Naish op cit note 5 at 42.

²³² See for example, s 435(1) of the Criminal Procedure Act.

²³³ This is especially so regarding adult offenders. See Anyebe op cit note 183 at 190. In relation to child offenders, it is also argued that the focus is essentially punitive. See Iyabode Oguniran 'The lock and key phenomenon: Reforming the penal policy for child offenders in Nigeria' (2013) Vol.10 No.1 *Justice Policy Journal* 1-20.

²³⁴ M.I. Edopkayi, 'Suspended sentence: Its desirability in Nigeria', undated, <http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/SUSPENDED%20SENTENCE,ITS%20DESIRABILITY%20IN%20NIGERIA.pdf>, [accessed July 26 2013]; academic discourse or research on the subject remains scant. The more recent publications tend to rehash much older publications that discuss the problem. For example, in the cited work, the author, a retired justice of the High Court of Edo State of Nigeria cited a 1972 publication (which was cited in Chapter 1 of this thesis), which claimed that magistrates do not consider the best interest of the offender during sentencing. The most recent resource cited in Edopkayi's work was published in 2004, meaning Edopkayi's paper was published sometime in or after 2004. In order of time, other publications that were cited were published in 1990. The researcher is not aware of any resource in Nigeria that analyses how judges' view about the main objects of punishment influence the choice of punishment. Such analysis is unlikely to be available in view of what Nigerian jurists describe as a punitive focus in punishment. See also Okonkwo & Naish op cit note 5 at 42.

²³⁵ See Edopkayi op cit note 234; Edopkayi also expresses this belief.

²³⁶ The law provides for plea bargain in ss 75 and 76, while chapter 4 deals with conditional releases, probation and community service for juvenile offenders.

²³⁷ No 11 of 2011. See generally Comfort Chinyere Ani 'Reforms in the Nigerian criminal procedure laws' (2011) Vol. 1 *NIALS Journal of Criminal Law and Democracy* 52-90.

administration of criminal justice.²³⁸ Particularly, s 3 of the CL states that ‘the need to balance the protection of rights and public interest’ and ‘the interest of justice’ will be the law’s guiding principle. This is the nearest to a statutory incorporation of the triad in any legislation in Nigeria. Under subsec (1)(c) of the provision, courts are to ensure that sentences are made to serve the interests of rehabilitation, restoration, deterrence, prevention and retribution. Penal measures provided by s 15 of the CL include the death penalty, imprisonment, fine or forfeiture. However, the section also provides for ‘other disposition measures’, such as ‘compensation, restitution, community service orders, probation, curfew orders, binding-over orders, rehabilitation and correctional orders, victim offender mediation and other restorative justice measures’.²³⁹

‘Other disposition measures’ were part of the penal sanctions that were provided for in the repealed law. Their retention in the new CL, when read with s 341 of the ACJL signals a commitment to infusing criminal law with restorative justice elements. Under s 341, a court may dismiss a charge or place an offender on probation after the charge is proved, if having regards to the nature of crime and the circumstances of the offender, it forms the opinion that it is not expedient to impose a punishment. The court shall also order damages or compensation for injury or loss.²⁴⁰ The provision affords the offender the chance of avoiding a criminal conviction.²⁴¹ Even where a conviction is made and a sentence is imposed, s 15 empowers the

²³⁸ See Press Briefing by Honourable Attorney-General and Commissioner for Justice Mr. Ade Ipaye on the Activities of the Lagos State Ministry of Justice on the Occasion of Second Anniversary of Second Term in Office of His Excellency Mr. Babatunde Fashola May 2012-April 2013. The briefing is available at <http://www.lagosstate.gov.ng/pagemenus.php?p=383&k=31> [accessed July 29 2013].

²³⁹ See also ss 286-289, 297, 341-348 of the ACJL: See Press Briefing op cit note 238; according to the State’s Attorney General, a Community Service Unit is fully implementing community service orders, while magistrates have been trained on the ‘purpose, advantages and workings of community service’. From August 2012 to March 2013, 1,154 offenders were sentenced to community service in the state. This is quite a break from the past. The total number of offenders sentenced to community service in 2013 came to 2, 324. See National Mirror ‘Lagos sentenced 2, 324 offenders to community service in 2013’ January 30 2014, available at <http://nationalmirroronline.net/new/lagos-sentenced-2-324-offenders-to-community-service-in-2013/>, accessed 10 January 2015.

²⁴⁰ Section 341 applies to offences that are triable summarily. An ‘offence triable summarily’ is one that is punishable with up to two years’ imprisonment. See s 371 of ACJL.

²⁴¹ The same argument can be made regarding the use of binding over as a disposition measure under s 300 of Nigeria’s Criminal Procedure Act. In the case of *Akanni v State* (No. 2), 1980 (2) NCR 383 at 387, the High Court of Oyo state in South-West Nigeria held that ‘[a]n offence for which binding over is imposed ranks with a conviction ... However, the power to impose a binding over order does not depend on a conviction, as an offender may be acquitted and still be bound over to be of good behaviour.’ In this case, binding over will be regarded as an act of ‘preventive justice’.

court to impose other disposition measures in addition to the criminal sentence. This again highlights the restorative justice emphasis of the law. Where the circumstances permit, disposition measures can be used to facilitate victim offender mediation, through which the social imbalance occasioned by the criminal act can be repaired.

The ideas that underpin these developments are laudable, and it is a fortunate development that the federal criminal justice bills that await passage by the national legislature also emphasise restorative justice. For example, Part 21 of Administration of Criminal Justice Bill provides for ‘Probation and Non-custodial measures’. Section 421 of the Bill contains provisions that are similar to s 341 of the ACJL, while s 427 of the Bill seeks to introduce suspended sentences, community service and plea bargain into Nigeria’s federal sentencing scheme.²⁴²

The Lagos State law and the federal bills (when they become law) are a step in the right direction. They are capable of aiding a resolution of the uncertainty surrounding Nigeria’s sentencing policy.²⁴³ They deemphasise custodial measures and offer legislative statements of the goals and principles that should underpin Nigeria’s sentencing system. However, what they fail to do, is offer an overarching sentencing principle or object, which as discussed in chapter two, could yet subject sentencers to the burdensome task of determining which principle or principles should be dominant in any given case. At any rate, to ensure reasonable implementation of the new standards, the principles will need to be supplemented by guidelines that articulate the path to a rational sentencing scheme. The guidelines may suggest a dominant principle or object. The utilisation of plea bargain to dispose of recent cases involving economic and financial crimes illustrates the need for guidelines and an overarching principle. The plea deals in those cases were negotiated without the aid of a robust, consistent and uniformly

²⁴² Note also s 2 of the Criminal Justice (Victims Remedies) Bill 2006 which proposes that the criminal justice system guiding principles shall, amongst others, be to protect victims of crime throughout the criminal process (including offering treatment and ensuring victim’s remedy) and achieve more effective sentencing of offenders by emphasizing restitutive and compensatory sentencing. See Presidential Commission on Reform of the Administration of Justice in Nigeria *Proposals for Reform of the Administration of Justice in Nigeria* (2006) 123.

²⁴³ See Ani op cit note 237 at 55, 78-82 & 87-89; the author has suggested that the bill proposes a uniform criminal justice administration law. However, having regard to legislative competences within Nigeria’s federal system, the bill when passed may only apply in relation to federal offences, federal law enforcement agencies, and Nigeria’s federal capital territory.

enforced sentencing policy and guideline, and have come under severe criticisms for encouraging lenient sentences that defeat the objectives that underpin economic and financial crimes legislation in Nigeria.²⁴⁴ The criticisms highlight the important role that sentencing guidelines discharge in expressing penal policy and rationalising sentencing. Guidelines impact how plea bargains are negotiated, what penalties prosecutors may recommend and the factors that the court must take into consideration when contemplating sentence under a plea deal. A plea deal ought to contemplate the public interests that underpin the creation of particular crimes and the need for consistency in sentencing for such crimes. Indeed, the argument has been made, rightly, that a plea bargain should not occur outside these considerations, and much less so in the absence of a sentencing commission that sets the rules.²⁴⁵ Nigeria's sentencing scheme does not meet these requirements.

In a development that buttressed the importance of rationalising sentencing, the Lagos State government announced plans to develop a 'sentencing guideline bill'.²⁴⁶ Whether legislation is the most appropriate way to go about developing guidelines is of course open to debate. The guideline models discussed in chapter 6 suggest there are far more efficient ways to develop guidelines. That said, it is a welcome development that the state government is contemplating guidelines. A guideline legislation that can be refined through usage is better than none. Nevertheless, while the guideline legislation is being awaited, the State's courts (and federal appellate courts when they sit on appeal over decisions of the State's courts) need to assume the challenge of articulating guidelines that will regulate how the new sentencing

²⁴⁴ This suggests a critical need for reappraising the role of plea bargain in administering criminal justice in Nigeria. See Adedayo Adedeji, 'Plea bargain and the administration of criminal justice' *Punch*, February 12 2013, available at <http://www.punchng.com/feature/the-law-you/plea-bargain-and-the-administration-of-criminal-justice/>, [accessed August 8 2013]; See also Roundtable on Conviction to Compromise: The plea bargain option, April 19, 2012, under 'Observations', para 53, available at http://www.nials-nigeria.org/round_tables/ROUNDTABLE%20ON%20CONVICTION%20TO%20COMPROMISE%20THE%20PLEA%20BARGAINING%20OPTION.pdf, accessed on 7 August 2013. The Nigerian Institute of Advanced Legal Studies has argued against using plea bargains in cases of corruption and financial crimes. See also Nkechukwu Nnochiri 'CJN abolishes plea bargain' *Vanguard* November 16, 2011, available at <http://www.vanguardngr.com/2011/11/cjn-abolishes-plea-bargain/> [accessed August 8 2013].

²⁴⁵ Jennifer F Reinganum, 'Sentencing guidelines, judicial discretion and plea bargaining', undated, 5, available at <http://www.vanderbilt.edu/econ/faculty/Reinganum/juddisc.pdf>, accessed on 29 July 2013; Stephanos Bibas 'White-collar plea bargaining and sentencing after Booker' (2005) 47 *Wm. and Mary L. Rev* 721; see also Alan Vinegrad 'Justice Department's new charging policy, plea bargaining and sentencing policy' (2010) Vol. 243 No. 110 *New York Law Journal*; see further recommendations 33 to 37 of statement from Roundtable op cit note 244.

²⁴⁶ Press Briefing op cit note 238.

measures are utilized. Daunting as this may be, the task is both imperative and urgent. This is because despite the positive reforms introduced through the new laws, there remains a worryingly punitive bent in the State's criminal justice policy. This is borne out by the aforementioned 2011 Criminal Law, which endorses steep mandatory or minimum punishments that are hardly consistent with the spirit of the reforms.²⁴⁷ The State's courts must confront this, relying on some of the principles or arguments that have been advanced in this chapter. Their ability to do so will inspire new jurisprudence on the constitutionality and proportionality of punishments. Until the courts are able to do this, the emerging focus on corrective and restorative measures in penal policy will be obscured by the punitiveness of the laws. Of course, judicially developed guidelines are not without problems, as illustrated in the next chapter, with particular reference to South Africa. For Nigeria however, it is a good and necessary place to start. It is, in fact, long overdue.

4.5 Conclusion

This chapter has sought to demonstrate that a normative framework is essential to any system of sentencing. In South Africa, the search for a normative framework starts with the Constitution's guarantees of human dignity and prohibitions of cruel, inhuman or degrading punishments. This protection continues to undergo judicial elaboration and has been affirmed as the essential standard against which the constitutionality and proportionality of punishments must be measured. South African courts have discharged themselves relatively well in elaborating the constitutional principles especially, and Nigerian courts can learn from their willingness to probe the constitutionality and proportionality of punishments.

Ongoing reforms in Nigeria are commendable, because they have the potential to modernize sentencing in the country. What needs to be injected into the reforms is an unambiguous prohibition against inhuman and degrading punishments in Nigeria's Constitution.

²⁴⁷ Examples of such offences include robbery, armed robbery, attempted robbery under ss 295 and 296, and some special cases of willful damage to property under s 349 of the Lagos Criminal Law, 2011.

There is also a need for sentencing to affirm constitutional principles and enhance other objects of punishment besides retribution and deterrence.²⁴⁸ Failure to instil a clear rights-based standard in punishment poses at least two serious problems. First, it has resulted in an underdeveloped jurisprudence about human dignity and punishment. Secondly, it perpetuates statutes that prescribe punishments that verge on cruelty. Examples of this include statutes that prescribe the death penalty for armed robbery, kidnapping and adultery, even where the loss of life does not accompany the crime.

The constitutional lapse described in this chapter forestalls constructive discussion of the proportionality between crime and punishment by Nigerian courts. In what is a probable manifestation of this problem, Nigerian courts have considered it beyond their remit to impugn penal prescriptions that are excessively severe or that employ force or pain needlessly. Thus, they unquestioningly impose the prescriptions.²⁴⁹ This suggests the need to review the criminal legislation in Nigeria, with a view to establishing cardinal and ordinal limits. Further, as the legislative framework stands, it leaves the door open to the individual quirks of sentencers, making it possible to apply different standards without offering explanations, and to impose sentences that do not enhance consistency and proportionality. Such outcomes have encouraged much public cynicism over Nigeria's criminal justice process.²⁵⁰ It must be admitted though, that achieving consistency and proportionality poses practical challenges, as will be seen in the next chapter.

²⁴⁸ Ani op cit note 237 at 54.

²⁴⁹ See Businessday, 'Criminal Sanction and the parody of the Nigerian law', February 7 2013, available at <http://www.businessdayonline.com/NG/index.php/law/legal-insight/51269-criminal-sanction-and-the-parody-of-the-nigerian-law>, accessed on August 13 2007.

²⁵⁰ See Premium Times 'Director jailed 2yrs for stealing N33bn pension fund freed on N250,000 fine' January 28, 2013, available at <http://premiumtimesng.com/news/117599-director-jailed-2yrs-for-stealing-n33bn-pension-fund-freed-on-n250000-fine.html>, accessed on August 13 2007; Premium Times 'Man gets 3-year jail term for stealing phone handset, as pension thief is freed for stealing N2billion' January 29, 2013, available at <http://premiumtimesng.com/news/117872-man-gets-3-year-jail-term-for-stealing-phone-handset-as-pension-thief-is-freed-for-stealing-n2billion.html>, accessed on August 13 2007.

Chapter 5 Sentencing and the Use of Judicial Discretion

5.1 Introduction

This chapter examines how courts have utilised the normative standards discussed in the previous chapter to determine appropriate sentences in specific cases. It examines sentencing reforms and trends in South Africa, and further explores the assertion in chapter 3 – that sentencing reforms, legislation, and the judicial enunciation of sentencing principles occur within a socio-political context – to unveil the context of sentencing for rape crimes. It also uses the sentencing framework for rape crimes to illustrate how public apprehensions regarding violent crimes provoke tough measures that raise the penalties for certain crimes and how judicial interpretations moderate or fail to moderate the outcomes of applying such laws.

This chapter's focus on sentencing for rape is for a number of reasons, such as the strident criticisms of inconsistencies and the absence of proportionality that have attended sentencing for the crime. According to one of the criticisms, sentencers undermine the policy considerations that underpin minimum sentencing legislation by imposing sentences that fail to reflect the gravity and endemic nature of rape in the South African society.¹ The chapter probes the criticism, by reviewing the utility of the proportionality principle in enhancing sentencing consistency in South Africa. Another reason for the chapter's focus on rape stems from the fact that the crime has been on the fore of social action lately.² As a result, the chapter explores how

¹ See for example, Nicole J Kubista 'Substantial and compelling circumstances': Sentencing of rapists under the mandatory sentencing scheme' (2005) 1 *SACJ* 77.

² The rape crisis in South Africa was brought to a head by the gruesome rape and murder of Anene Booysen in February 2013. This and several other cases prompted the South African government to launch a national 'Stop Rape Now' campaign. However, since then, there have been gory rape crimes – some involving infants – that continue to stir apprehension and concern. A recent report claims that South Africa has the highest rape rate in the world, and that there are seven rapes in the country for every single rape in the United States of America. A high percentage of perpetrators of rape are also children. See 'Remarks by President Jacob Zuma at the launch of the Stop Rape Campaign in schools hosted by the Department of Basic Education and LEAD SA, Mitchells Plain, Cape Town' available at <http://www.thepresidency.gov.za/pebble.asp?relid=14996>, accessed 9 September 2013; See Mail & Guardian 'Will Anene Booysen's brutal rape and murder shake the nation into action?' February 13, 2012,

judicial responses to rape correspond with the public sense of trepidation and with the policy considerations that underpin statutory punishments for sexual offences. There are two reasons for doing this. First, the chapter aims to highlight aspects of sentencing that require continual improvement in South Africa. It argues for instance, that the judicial approach to implementing statutory prescriptions for rape crimes exposes inconsistencies that highlight the need for a more structured framework within which courts may exercise discretion. Secondly, it aims to show that despite the shortcomings, there is a process of judicial ratiocination of punishment by South African courts, which is lacking in the way Nigerian courts approach sentencing. It is suggested that Nigerian courts need to take the challenge of embarking on similar processes without repeating the mistakes of South African courts. Consequently, the chapter focuses mostly on judicial decisions in order to portray the reasoning process that sentencers employ during sentencing.

5.2 The Role of Judicial Discretion in Sentencing

South African courts typically assert the need for discretion in awarding punishments³ and have traditionally resisted attempts to regulate that discretion through mandatory sentencing legislation.⁴ The resistance is rooted in a judicial policy that sentencers have evolved through careful enunciation of the principles that should undergird sentencing. The policy upholds discretion as the cornerstone of judicial sentencing in South Africa⁵ and requires that discretion be exercised in a judicious manner that balances the ‘triad consisting of the crime, the offender

available at <http://mg.co.za/article/2013-02-15-00-will-anene-booyens-brutal-rape-and-murder-shake-the-nation-into-action> accessed 9 September 2013; Dominic Skelton ‘More than 45,000 South African women raped so far this month: Blow the whistle’ *Times Live* 20 August 2014 available at <http://www.timeslive.co.za/local/2014/08/20/more-than-45000-south-african-women-raped-so-far-this-month-blow-the-whistle>, accessed 24 August 2014; United States Department of State ‘South Africa 2014 Crime and Safety Report’ available at <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=15318>, accessed 24 August 2014; CNN International ‘The end of innocence: Photojournalist documents child sexual abuse’ available at <http://amanpour.blogs.cnn.com/2014/02/26/the-end-of-innocence-in-south-africa-children-raping-children/>, accessed on 24 August 2014.

³ *Director of Public Prosecutions, Western Cape v Prins* [2012] 2 All SA 245 (SCA).

⁴ Jonathan Burchell *South African Criminal Law and Procedure, Volume I: General Principles of Criminal Law* 4 ed (2011) 24; JJ Naser ‘Mandatory minimum sentences in the South African context’ (2001) Vol. 3 No. 3 *Crime Research in South Africa* available at <http://www.crisa.org.za/volume3/vvs.html>, accessed 29 April 2013.

⁵ See Republic of South Africa, *Report of the Commission of Inquiry into the Penal System of the Republic of South Africa* (1976) 5.1.4.1.1 – 5.1.4.1.11.

and the interests of society,⁶ and complies with the ‘dictates of fairness and justice’. Sentencers oppose mandatory sentences because of their proneness to rigidity and to the preclusion of a ‘careful and meticulous’ balance of the triad. Mandatory sentences also tend to deny proper regard for the offender’s interests.⁷

A critical reason for the judicial preference for sentencing discretion stems from the shortcomings of legislation. Penal statutes are insentient and incapable of foreseeing or responding to the infinite and complicated ‘variety of circumstances that attend the commission of crimes’.⁸ To indiscriminately apply statutory punishments to crimes would therefore be arbitrary and unfair. Courts have accordingly regarded themselves as better positioned than legislatures to appraise the circumstances in which a crime is perpetrated and to adapt sentences to meet the requirements of justice in every individual case.⁹ This fact has led courts to routinely hold that sentencing is ‘pre-eminently a matter for the discretion of the trial court’.¹⁰ Discretion facilitates a more balanced and fair process that tailors punishment to suit the individual circumstances of the crime and offender, while fulfilling the requirements of justice. Mandatory sentences achieve the opposite; they unduly constrain this important function by stripping the court of discretion over the type and severity of punishment they can impose.¹¹

A crucial feature of s 276(1) of the 1977 Act is the legislative (and normative) basis it provides for exercising judicial discretion in sentencing and the extent to which courts may do so. In *Director of Public Prosecutions, Western Cape v Prins and Others (the Prins case)*,¹² the Supreme Court of Appeal held that the provision vested courts with general sentencing discretion

⁶ *S v Zinn* 1969 (2) SA 537 (A).

⁷ See Republic of South Africa op cit note 5.

⁸ *S v Malgas* 2001 (1) SACR 469 (SCA).

⁹ Ibid at 472 para 1.

¹⁰ The authority for this principle is the decision of the Appellate Division in *R v Mapumulo and Other Appellants* 1920 AD 56. The Court rationalised this principle with the opinion that the trial court is in a position to appreciate the case, evaluate the circumstances in which the crime was committed and decide the measure of punishment better than an appellate court would. This reasoning further establishes the principle that appellate courts should be slow to interfere with the discretion of the trial court. In *R v Freedman* 1921 AD 603, the same court held that an appellate court would not interfere with the discretion of the trial court if that discretion was ‘properly and judicially exercised’. These judicial principles have been frequently followed. See for example, *S v Rabie* 1975 (4) SA 855 (A).

¹¹ *S v Toms*; *S v Bruce* 1990 (2) SA 802 (A) at 806H-807A.

¹² Supra note 3.

to impose punishment for common law crimes, as well as statutory crimes where the relevant statute fails to prescribe a penalty.¹³ The only limitation to this power is s 92 of the Magistrates Courts Act,¹⁴ which imposes the upper sentencing jurisdiction of district and regional courts. On the other hand, there are no limitations to the sentencing jurisdiction of high courts. Section 283 of the 1977 Act also affirms the role of discretion in sentencing; the provision permits a court to impose a lesser sentence than the prescribed penalty if mitigating circumstances permit.

Although courts have developed guiding principles to regulate discretion, the South African Law Commission¹⁵ has acknowledged that discretionary sentencing was the subject of significant criticisms in the 1990s. The criticisms ranged from claims of differential treatments,¹⁶ to complaints about sentencing decisions that failed to give sufficient weight to the seriousness of violent crimes.¹⁷ A third criticism was that custodial sentences were being utilized for minor crimes that would have been better redressed through reparative strategies. These sentencing patterns resulted in serious problems of overcrowded prisons that have had to be resolved through early release programmes for offenders. Early releases, in turn, undermined the penal purpose behind the penalties and exposed additional sentencing irregularities.¹⁸ An examination of these problems must start with a review of South Africa's minimum sentencing legislation.

¹³ Ibid at para 13; the court noted that the 'measure of punishment' for common law crimes 'is a matter for the judge who imposes it' and that parliament defers to courts in this regard by not enacting penalties for such crimes.

¹⁴ Act 32 of 1944.

¹⁵ South African Law Commission Report *Sentencing (A New Sentencing Framework)* (2000).

¹⁶ Ibid at 3. This resulted in comparable cases not being treated alike. The Commission acknowledged that the allegations were hard to deal with and that the situation may have been encouraged by the absence of clear sentencing guidelines, which leaves sentencers with very broad discretion.

¹⁷ According to this criticism, disproportionately light sentences were awarded for offences – especially 'certain types of sexual offences' – that deserved severe, deterrent and incapacitative punishments. It was also alleged that victims of serious crimes were not being heard on matters of sentencing for particular crimes, or on serious crimes generally, thereby downplaying the importance of the crimes. See Stephan Terblanche 'A sentencing council in South Africa' in Arie Freiberg & Karen Gelb (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (2008) 191-199 at 192.

¹⁸ South African Law Reform Commission op cit note 15 at 3-4.

5.3 South Africa's Criminal Law Amendment Act 105 of 1997

Concerns about irregularities in sentencing coincided with heightened public anxieties over the rise of violent crimes in South Africa and an intense period of political transition and constitutional development.¹⁹ The developments pitted two competing values or interests: on one hand was the clamour for heavier sentences for serious crimes, which signalled public gravitation towards stiff protectionist measures against dangerous offenders. On the other hand were emergent constitutional values that also required a balance between two interests, namely the public interest in protecting the values that underpin the Constitution and the interests of the offender.²⁰ These competing interests moved the Constitutional Court to caution against allowing alarming crime rates to 'justify extensive and inappropriate invasion of individual rights'.²¹ So, the overarching interest in punishment turns not just on the necessity of punitive and deterrent measures against violent offenders, but also on the imperative of directing punishment toward more reformatory objects. This, essentially, enlists a bifurcated approach to sentencing.

Section 51 of the Criminal Procedure Law Act 1997 Act was a legislative – and without question, a political²² – response to high crime levels and criticisms of sentencing discretion.²³ The provision is reproduced in Appendix A. Section 51 introduced a range of minimum sentences under Part I of Schedule 2 of the Act, which courts were obligated to impose. Under the schedule, three classifications of rape were rendered liable to life imprisonment on account of the seriousness of the classifications. Sentencing for rape that fell outside these classifications were liable to minimum sentences of ten to 25 years imprisonment.²⁴ Under s 51(3) however,

¹⁹ Lukas Muntingh 'Sentencing' in Chandre Gould *Criminal (in)justice in South Africa: A Civil Society Perspective* (2009) 178-200 at 180.

²⁰ South African Law Reform Commission op cit note 15 at 1-2. In *S v Salzwedel* 2000 (1) SA 786 (SCA), the court held that a lengthy sentence was necessary to communicate a strong message that the court would deal severely with crimes perpetrated against the ethos of the Constitution.

²¹ *S v Dlamini, S v Dladla and Others, S v Joubert, S v Schiervetkat* 1999 (4) SA 623 (CC) at 666 para B.

²² Muntingh op cit note 19 at 179.

²³ CR Snyman *Criminal Law* 4 ed (2002) 424; see also South African Law Reform Commission (2000) op cit note 16 at 4. According to Kubista, 'the mandatory minimums in s 51 are also an attempt to impose the same sentence upon similarly situated people'. See Kubista op cit note 1 at 79.

²⁴ The first category of rape crimes liable to life imprisonment comprises rape with aggravating circumstances. Such circumstances include multiple rapes, gang rape, rape by a person convicted and awaiting sentencing for rape, or rape by a person who knows he has the acquired immune deficiency syndrome. The second category is where the victim is under 16 years, or was vulnerable as a result of a physical or mental disability. The third category is where

courts may depart from the minimum sentences when they are ‘satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed...’ This provision is believed to have been modelled after the Minnesota Mandatory Minimum Sentencing rules. Unlike the Minnesotan code however, s 51 does not define what the ‘substantial and compelling circumstances’ phrase means.²⁵

Initial judicial attempts to interpret the phrase resulted in considerable confusion²⁶ that the Supreme Court of Appeal had to clear up in *S v Malgas*.²⁷ How the court brought clarity to the phrase will be discussed below. As a preamble to that discussion however, it is useful to note that the court interpreted the statute’s failure to define the phrase as an indication of the legislation’s intention that the circumstances should be judicially defined. This, according to the court, essentially preserved discretion in sentencing and indicated that minimum sentences are not mandatory. Apparently in response to *Malgas* and a host of other decisions that reiterated the principles in *Malgas*, s 51 was subjected to amendments. Section 1 of Criminal Law (Sentencing) Amendment Act 2007 (the 2007 Act), re-titled s 51 from ‘Minimum Sentences’ to ‘Discretionary Minimum Sentences for Certain Serious Offences’, suggesting the penalties prescribed therein are to be regarded as presumptive.²⁸

5.3.1 Section 51: Challenges Surrounding Interpretation and Constitutionality

Section 51 encountered a wave of criticisms surrounding the vagueness that resulted from the Act’s failure to define ‘substantial and compelling circumstances’.²⁹ The vagueness caused conflicting judicial interpretations. According to one interpretation, s 51 practically left courts

rape involved grievous bodily harm. Rapes that occur in other circumstances attract a sentence of ten to 25 years. See Appendix A for full provision of section 51 and the Schedule.

²⁵ See SS Terblanche & Julian V Roberts ‘Sentencing in South Africa: Lacking in principle but delivering on justice’ (2005) 18 *S. Afr. J. Crim. Just.* 187-202 at 192. The authors observe that South African courts have refused to interpret the phrase in the same manner as in Minnesota. See also s 11 Criminal Code Chapter 609, Minnesota Statutes 2014; see further South African Law Reform Commission op cit note 16; Kubista op cit note 1 at 79.

²⁶ Kubista op cit note 1 at 77.

²⁷ 2001 (1) SACR 469 (SCA) at 480 para A.

²⁸ For other amendments to the provision, see South African Law Commission op cit note 15 at 9-10.

²⁹ See The Western Cape Consortium on Violence Against Women ‘Submission to the Minister of Justice and Constitutional Development in Response to the Evaluation of the Criminal Law Amendment Act 105 of 1997’ (4 March 2005) 2-5, available at <http://www.ghjru.uct.ac.za/parl-submissions/Memorandum-Mandatory-Minimum-Sentencing.pdf>, accessed 5 February 2014.

with little or no sentencing discretion.³⁰ Another interpretation claimed the phrase merely affirmed those factors that courts have traditionally applied in mitigation or aggravation of punishment.³¹ Yet another interpretation of s 51 criticises the provision for breaching protections for the right to a fair trial under s 35(3)(c) of the Constitution, as well as the constitutional doctrine of separation of powers by purporting to limit how judges exercise discretion.³²

In *S v Blaauw*³³ the court attempted to steer a middle course between extreme interpretations of the ‘substantial and compelling circumstances’ phrase and how it limits discretion. To start with, the court held that by not ascribing a meaning to the ‘substantial and compelling circumstances’ phrase, the legislature intended that courts should exercise discretion when defining the phrase and the circumstances that would justify departure. The court then developed a test that required a cumulative evaluation of the balance between mitigating and aggravating factors. Using this test, a court may depart from the minimum sentence if it finds that imposing the mandatory sentence would be ‘grossly disproportionate to the crime ... or startlingly inappropriate or offensive to its sense of justice’. ‘Substantial and compelling

³⁰ See *S v Mofokeng* 1999 (1) SACR 502 (W) at 523 paras B-C and 524 paras C-D; the court held s 51 had ‘almost entirely deprived the courts of their discretionary powers to determine sentences appropriate to the circumstances of particular crimes and criminals’. It interpreted ‘substantial and compelling circumstances’ to mean the facts must be so unusual and exceptional that it exposes the injustice of the prescribed sentence and compels the conclusion that the imposition of a lesser sentence is justified’. The facts must be such that parliament cannot be supposed to have contemplated them when passing the legislation. The court criticized s 51 for setting a standard that upstaged the balanced approach that courts had hitherto followed, in preference for measures that were prone to inflict arbitrary punishments.

³¹ In *S v Dithotze* 1999 (2) SACR 314 (W) at 318, it was held that courts should have regard to all the factors that have been traditionally considered when imposing sentence, or employ the test used by an appellate court when reviewing sentence, which requires that the appellate court should impose a different sentence if sentence imposed by lower court is ‘disturbingly inappropriate’. The South African Law Commission also cited the unreported decision in *S v Majalefa and Another*, where the court held that the phrase in question ‘was intended to denote factors of solid material significance in relation to all the component factors which must irresistibly be taken into consideration for the purpose of sentence.... The sentence must not lead to an injustice. ... I think on this basis that the sentencing process will be the same as it was before the passing of the new Act.... [T]he starting point will still be a consideration of all the factors relevant to the passing of sentence. Proper consideration should be given to the well-known triad of factors, as dealt with in *Zinn’s* case.’ *S v Majalefa* was extensively quoted in *S v Blaauw* 1999 (2) SCR 295 (W) at 305I-306I. The Commission pointed out that the positions adopted in the *Mofokeng* and *Majalefa* cases were endorsed by other unreported high court decisions. See South Africa Law Reform Commission op cit note 15 at 11-13; Snyman op cit note 23 at 424-425; Nesper op cit note 4.

³² *S v Mofokeng* supra note 30 at 526 para F; *S v Dodo* 2001 (1) SACR 301 (E) at 313 paras B-I & 319 paras H-I.

³³ 1999 (2) SACR 295 (W).

circumstances’ would, in that instance, be said to be present.³⁴ To impose a mandatory minimum sentence when such circumstances exist would be grossly disproportionate and violate constitutional guarantees for the rights to a fair trial and to not be subjected to cruel, inhuman or degrading punishments.³⁵

Valuable as the *Blaauw* decision was, it did not resolve what circumstances would justify departure from the prescribed punishment, or as the South African Law Commission observed, how the traditional sentencing factors were to be evaluated within the framework of s 51. *S v Jansen*³⁶ attempted to explain how traditional factors applied under s 51. The accused in the case attacked the constitutionality of s 51, arguing that it mandated arbitrary punishments – regardless of the factual circumstances of the crime – thereby violating constitutional protections against cruel, inhuman and degrading punishments. The court agreed in part that a rigid or mechanistic application of mandatory sentences ‘without regard to the individual context’, the ‘prospect of rehabilitation’ and how these should affect the choice of punishment could well violate prohibitions against cruel punishments and ‘compromise’ constitutional protections for equal treatment. At the same time however, the court held that sentencing had to be ‘predicated on [a] principle that curtails the evils of unbounded discretion and ... ensures that the sentence bears a proportionate relationship to the case’. Section 51 supplied that principle by allowing courts a limited scope to individualize punishment. By implication then, the overarching question regarding the constitutionality of punishments under s 51 would have to be evaluated on a case by case basis, in the light of whether a specific punishment would, for instance, be so disproportionate as to constitute cruel, inhuman or degrading punishment.³⁷

In *S v Malgas*,³⁸ the Supreme Court of Appeal imposed some level of clarity and certainty on the interpretation and application of s 51. The case dealt with two issues in particular, namely whether s 51 breached the constitutional separation of powers and the true import of the

³⁴ The court also found that ‘substantial and compelling circumstances’ ordained a stricter test than what obtained under earlier pieces of legislation that allowed departure from prescribed sentences in exceptional or special circumstances. See *S v Blaauw* supra note 33, at 302 para I – 305 para C, 311 paras G-H.

³⁵ Ibid at 312 paras F-G.

³⁶ *S v Jansen* 1999 (2) SACR 368 (C).

³⁷ Ibid at 373 paras D-I and 374 paras E-F.

³⁸ Supra note 8.

‘substantial and compelling circumstances’ clause. With regards to the former, the court held that the enactment of statutes that create offences and prescribe penalties fell within the constitutional competence of the legislature and that laws made in exercise of such competence are consistent with the doctrine of separation of powers. The exception to this however, is when such laws are so prescriptive as to strip the court of discretion, or compel it to impose punishments which, in the circumstances of a given case, run contrary to the court’s sense of fairness or justness. Having laid down this principle, the court found that s 51 was not unconstitutional, as the clause ‘substantial and compelling circumstances’ allowed a substantial measure of sentencing discretion. Thus, where the circumstances justified it, courts were at liberty to depart from the prescribed minimum sentence.³⁹

What emerged from the *Malgas* decision was a judicial clarification that refuted perceptions that minimum sentences were mandatory. The decision established that s 51 must be read through the lenses of the nation’s constitutional values,⁴⁰ meaning that courts must accord to offenders those constitutional protections against excessive punishments, which in this regard would be treated as contrary to ss 9 and 12(1)(e) of the Constitution.⁴¹ Section 51 must also be interpreted with its legislative objective in view, which was to respond to a worrisome escalation of the specified crimes, by providing for ‘a severe, standardised, and consistent response from courts’.⁴² Thus, by enacting the provision, parliament hinted at a shift towards greater severity for specific crimes.⁴³ This shift in turn signalled that emphasis in sentencing would no longer rest on the unfettered discretion that judges enjoyed, but on the objective factors of the gravity of the crime and the public need for effective sanctions.⁴⁴ Nonetheless, courts retained discretion to

³⁹ Ibid at 480 paras A-C & 481 paras F-G.

⁴⁰ Ibid at 476 para C.

⁴¹ Section 9 of the Constitution affirms right to equality and equal protection of the law. Section 12(1)(e) prohibits cruel, inhuman or degrading punishment.

⁴² *S v Malgas* supra note 8 at 476 para H – 477 para A & 481 para I.

⁴³ Ibid at 476 para D – 477 para A; related to this point is the court’s observation that weight must be attached to the interim nature of the provision, but how this could have influenced the guide that the court formulated, or indeed the final outcome of the court’s application of the guide to the case at hand, is not clear. The lifespan of the provision has been repeatedly renewed and *Malgas* continues to be the authority on the interpretation of the provision.

⁴⁴ Ibid at 482 para B.

depart from a mandatory sentence if in the circumstances of the case imposing it would result in injustice. The reasons for departure, as s 51 provides, must be substantial and compelling.⁴⁵

The challenge then remains how to interpret ‘substantial and compelling’. The court’s approach to interpreting the phrase was both robust and restrained. To begin with, a proper interpretation would encompass those factors that have traditionally been taken into consideration when fixing appropriate sentences. In other words, courts should continue to evaluate the triad, balancing them against mitigating and aggravating factors and the main objects of punishment. However, when a court forms a deep sense of unease that leads to the firm conviction that applying the prescribed minimum in a particular case would occasion injustice, it must impose a lesser punishment. In its contemplation of the meaning of ‘substantial and compelling circumstances’, the court enumerated circumstances that should or should not be considered as fitting that description.⁴⁶

In *S v Dodo*,⁴⁷ the *Malgas* guiding principles were affirmed by the Constitutional Court as the ‘undoubtedly correct’ interpretation that offers an ‘overarching’, ‘step by step procedure’⁴⁸ to applying the provision. Specifically, the court affirmed the procedure as the ‘determinative test’ for interpreting ‘substantial and compelling circumstances’. Further, it held that the provision acknowledges that the court has both the discretion and obligation to impose a lesser sentence when the minimum prescription would, in the circumstances of the case, be disproportionate to the crime, the criminal and the public interest. In other words, minimum sentences operate under a broad scheme of judicial discretion, and no legislature may rightly compel courts to impose disproportionate sentences that also violate s 12(1)(e) of the Constitution.⁴⁹ In the court’s view, affirming judicial discretion in sentencing was consistent with the undeniably pre-eminent powers that the legislature had to define and penalise criminal behaviour. However, the legislature oversteps its remit and breaches the constitutional separation

⁴⁵ Ibid at 477 para A-B.

⁴⁶ Ibid at 480 para G – 481 para E; see also Jonathan M Burchell and John Milton *Principles of Criminal Law* 3 ed (2005) 90-92.

⁴⁷ *S v Dodo* 2001 (3) SA 382 (CC).

⁴⁸ Ibid at 392 para B & 393 para B.

⁴⁹ Ibid at 402 para E – 403 para A & 405 paras A-B.

of powers if it enacts laws that obligated courts to impose disproportionate sentences.⁵⁰ As the court said decisively on the subject therefore, '[t]he test in *Malgas* must be employed in order to determine when s 51(3)(a) can legitimately be invoked by a sentencing court to pass a lesser sentence than that prescribed by s 51(1) or (2)'.⁵¹

The *Malgas* principles were not meant to be rigid. *Dodo* reasonably recognised that it will continue to be 'refined and particularised' on a case by case basis.⁵² This suggests that the specific circumstances that justify imposing a lesser sentence may be as varied as the circumstances of each case differ. In apparent cognisance of this and in deference to the legislative intent behind the 1997 Act, *Malgas* accepted that the prescribed sentences are 'ordinarily appropriate' and that courts may only depart from them when there are 'weighty justification[s]' to do so.⁵³ The enquiry as to whether such justification exists must start with a consideration of the sentencing factors that courts have traditionally considered. However, the factors put together, must 'be substantial and compelling'. This test, imprecise as it may seem to be, was predicated on the need to avoid rigidity, while also foreclosing subjective interpretations that defeat the object of the provision. Accordingly, 'substantial and compelling circumstances' was held to exclude

[s]peculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations ... equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them.⁵⁴

It is necessary to note that *Malgas* only provides guidelines for sentences for offences covered by s 51. It does not extend to other statutory offences and common law crimes. For these other offences, the traditional approach remains valid. This is the obvious import of *Malgas*'

⁵⁰ Ibid at 393 para D – 398 para E; according to the court, the power to require courts to prescribe penalties is implicit in s 35(3)(n) of the Constitution, which entitles every accused person to the benefit of the least severe punishment if the punishment prescribed for the offence has changed between the time of commission and the time of sentencing.

⁵¹ Ibid at 392 and 405 para D.

⁵² Ibid at 392A-393C.

⁵³ *S v Malgas* supra note 8 at 480 para B.

⁵⁴ Ibid at 477 paras D-E.

affirmation that traditional principles of sentencing were not abrogated by s 51, and that they would still apply even for offences covered by the section. In sentencing for statutory crimes, the statutory sentencing requirements for such crimes apply, as illustrated by chapter four's discussion of sentencing for crimes under POCA. The only other issues that may impact sentencing for common law and statutory crimes are to be found in the constitutional requirements that were also discussed in chapter four.

5.4 Applying *Malgas*' Determinative Test and the Problems Associated Therewith

Naturally, the first point to note is the fact that South African courts have invested considerable effort into developing a method for applying s 51. The decisions in *Malgas* and *Dodo* were profoundly the acme of these efforts. However, criticisms of these efforts echo John Selden's description of the doctrine of equity as an 'uncertain measure' that shifted with the conscience or compared to the length of the foot of whoever was the Lord Chancellor.⁵⁵ These criticisms have centred on the point that applying the *Malgas* test has not met the need for proportionality, consistency and predictability in sentencing, due to the considerable discretion with which courts have interpreted and applied the guidelines that *Malgas* offered.

The Constitutional Court's view that the *Malgas* test should be refined and particularised on a case by case basis suggests the difficulty of using the judicial process to regulate the factors that should be considered during sentencing. As noted earlier, an infinite variety of circumstances that legislatures cannot all foresee come into play in the commission of crimes and have an impact on sentencing. This makes it necessary for legislation to avoid unnecessary specificity that may constrain the ability of the court to determine suitable punishments. For similar reasons, courts also exercise restraint and lean towards the sagacity of formulating general principles, refining and particularising them to meet the requirements of individual cases.

⁵⁵ The criticism was directed against the manner in which successive Lord Chancellors formulated and applied to rules of equity, based on their subjective views on what the justice of the matter required and without recourse to precedents. Until the rules of equity developed a predictable form Lord Chancellors exercised complete discretion in the rules they applied; see John Selden & Richard Milward, *Table Talk: Being the discourses of John Selden, Esq, or His Sense of Various Matters of Weight and High Consequence. Relating Especially to Religion and State* (1786) 45; see also Alistair Hudson *Equity and Trusts* 6 ed (2010) 14-15.

This was the point made in *Malgas* and *Dodo*: judicial restraint in this context ensures that courts do not establish precedents that stifle the pre-eminently discretionary function that trial courts engage in when sentencing offenders.

The problem with this, in South Africa's sentencing experience in particular, is that broadly formulated principles leave the door wide open for courts to do precisely what was deplored in *Malgas* and *Dodo*, to wit, to engage in ratiocinations that pander to speculative hypotheses, maudlin sympathies and other subjective elements. Indeed, judicial attempts to particularise the *Malgas* test in individual cases and to weigh 'substantial and compelling circumstances' against the triad of interests and objects of punishment have resulted in conflicting outcomes that often stray from the *Malgas* standard. For one thing, it has not always been obvious that courts regard s 51 as obligating compliance. Some post-*Malgas* interpretations have regarded minimum sentences as discretionary or as requiring inquiry into whether the prescribed sentence is not disproportionate. Just how they do this is discussed shortly, having particular regard to sentencing for rape crimes. But first, it is necessary to illustrate how epidemiological patterns of rape crimes in South Africa may have influenced penal and sentencing policy regarding the crime.

5.4.1 Epidemiological Patterns of Rape

Besides rape, s 51 prescribes severe penalties for other violent or serious crimes. In the South African society however, the violence and invasiveness of rape vividly and particularly illustrates how public apprehensions and outrage over serious crimes have found expression in a regime of steep punishments.⁵⁶ The nature and rampancy of the crime and other sexual offences prompt a heightened sense of urgency. Rape is particularly invidious. It violates the victim's individual space, body and sexual integrity. It negates the victim's autonomy (i.e., control of access to her/his body) and exploits the social or power imbalances between the aggressor and victim. Rape has more than a victim-only impact, because it projects an ominous sense of general insecurity and vulnerability unto the larger public space. Some have even argued that

⁵⁶ Note discussion in chapter 3 section 3.3a regarding the bifurcation in South Africa's penal policy. Section 51 represents a shift to punitive responses to violent or serious crimes.

rape is inherently more harmful than other forms of physical violence because its sexual nature conveys an element that depicts the crime as having more than physical dimensions of aggression. Proponents of this view argue that rape also inflicts severe psychological harm and that it is an attack on the identity and dignity of its victim. In her book on the subject, Maria Eriksson refers to studies that show that victims of rape experience more post-traumatic stress than victims of other forms of violence. In her words, '[r]ape can make the victim feel dehumanized, the mere object of the sexual gratification of the attacker, as well as being denigrated and humiliated'.⁵⁷

These social consequences have been acknowledged in a host of judicial decisions, such as *S v Chapman*,⁵⁸ the *Prins* case and *Opperman and Another v S*.⁵⁹ The judgments commonly describe rape and other forms of sexual violence as serious crimes that deserve the strict public censure that is expressed in the severe penalties provided in s 51.⁶⁰ With epithets like

⁵⁷ Maria Eriksson *Defining rape: Emerging obligations for States under International Law* (2011) 59-61, and see generally chapter 3. Feminists have debated whether rape is a crime of physical (aggression) or sexual nature, but most generally agree on the presence of all or a combination of the physical, sexual and psychological elements. See Vanessa E Munro 'From consent to coercion: evaluating international and domestic frameworks for the criminalization of rape', Clare McGlynn 'Feminist activism and rape law reform in England and Wales: a Sysyphean struggle?'; and Hélène Combrink 'Rape law reform in Africa: 'More of the same' or new opportunities?' in Clare McGlynn & Vanessa E. Munro (eds) *Rethinking Rape Law: International and Comparative Perspectives* (2010) 17-29, 139-153 and 122-135 respectively. See also Pithey, Artz & Combrinck et al, 'Legal aspects of rape in South Africa', a Discussion Document commissioned by the Deputy Minister of Justice, the Republic of South Africa, and prepared for Rape Crisis (Cape Town), Women and Human Rights Project, Community Law Center, University of Western Cape, and Institute of Criminology, University of Cape Town (April 30 1999), available at <http://www.ghjru.uct.ac.za/parl-submissions/Legal-Aspects.pdf>, accessed on 27 May 2013. The authors say in chapter 1, that '[u]nlike other crimes against the person, rape not only violates women's physical safety, but their sexual and psychological integrity. It is a violation that is not only marked by violence, but by a form of "sexual terrorism". The act of rape is invasive, dehumanising and humiliating. It is a crime that is akin to torture.' See further, Albertyn, Artz & Combrinck et al, 'Women's freedom and security of the person' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, law and justice* Cape Town: Juta (2007) 295 – 380 at 299-301; the authors argue that sexual crimes must be contemplated within the social context of the power imbalances and culture of violence in South Africa. It seems that courts have avoided getting enmeshed in debates about whether sexual crimes are acts of physical aggression or intrinsically of a sexual nature. *S v Abrahams* 2002 (1) SACR 116 (SCA) at 124 para G – 125 para G; *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at 442D were rape cases in which the power relationships expressed in the many feminist views about rape were identifiable. Yet the SCA's findings suggest that it regarded physical control and lust to be intertwined.

⁵⁸ 1997 (3) SA 341 (SCA).

⁵⁹ (643/09) 2010 ZASCA 83 (31 May 2010).

⁶⁰ Ibid at para 15; the court cited 2007/2008 statistics which showed that children were victims in 44.4 per cent of all rapes and 52 per cent of all indecent assaults, and that in 2005, yearly estimates showed that 400,000 to 500,000 children were sexually assaulted. See also Mathews, Abrahams & Martin et al, "'Every Six Hours a Woman is Killed by her Intimate Partner': A national study of female homicide in South Africa", MRC Brief No 5, June 2004,

“humiliating”, “degrading”, “repulsive”, “brutal invasion”, they describe rape as a crime that strikes at the dignity, privacy and personal integrity of its victim. It violates values that are at the heart of the Constitution and imposes a sense of public apprehension and insecurity, especially for women and children.⁶¹ In relation to child victims, society’s abhorrence of the crime becomes even more pronounced, as the crime does more than rob them of their childhood. In *Opperman*⁶² the court cited data that suggested that sexually abused victims may become sexual offenders themselves. Further, and to underline the seriousness with which the crime ought to be treated, the Supreme Court of Appeal in *S v Vilakazi*⁶³ cited epidemiological studies that suggest that ‘women’s rights to give or withhold consent to sexual intercourse is one of the most violated of all human rights in South Africa’.

Statistics and other researches into the epidemiology of rape in South Africa reinforce these claims. In 2000, Statistics South Africa issued the report of a study that measured the frequency of rape crimes and the response of the criminal justice system. According to the study 55,000 rapes were perpetrated in 1997, meaning 134 in 100,000 women were raped that year. Approximately half that number reported the crime, while about 47.6 per cent were referred to court. Of this number, 45.6 per cent were withdrawn from court, while 4.5 per cent settled out of court. Only one-fifth of prosecuted cases resulted in convictions.⁶⁴ In 2000, there was a fall in

available at <http://www.mrc.ac.za/policybriefs/woman.pdf>; accessed May 23 2013. According to the study, 40-70 per cent of all female homicides are committed by an intimate partner. The perpetrators were ‘overwhelmingly male’. In 15.3 per cent of the cases, the victims had been sexually assaulted. See further, Anbertyn, Artz & Combrinck op cit note 56 at 301. The authors noted sketchy unofficial statistics compiled by a non-governmental organization which suggest 1 out of 20 rapes were reported to the police. A subsequent study in 2012 showed that frequency of rape crimes had reduced to one incident every eight minutes. See Abrahams, Mathews & Jewkes et al, ‘Every eight hours: Intimate femicide in South Africa 10 years later!’ MRC Research Brief (August 2012), available at <http://www.mrc.ac.za/policybriefs/everyeighthours.pdf>, accessed 4 June 2013; Recently, the South African Broadcasting Corporation (SABC News) reported that Interpol labeled the country as the world’s rape capital. According to the report, women were more likely to be raped than educated. It estimated that a woman is raped every 17 seconds, but that 1 out of 36 incidents of rape is reported. See SABC News ‘South Africa, world’s rape capital: Interpol’, available at <http://www.youtube.com/watch?v=XqhwEVhebPc>.

⁶¹ See *S v Chapman* 1997 (3) SA 341 (SCA), 5A-C; *DPP v Prins* supra note 3 at 186 paras E-F.

⁶² *Opperman and Anor v S* supra note 59.

⁶³ 2009 (1) SACR 552 (SCA) at 556 paras A-B. A report of crime statistics that the court cited claimed that in 2007, 36,190 rapes were reported to the police.

⁶⁴ Ross Hirschowitz, Seble Worku & Mark Orkin, ‘Quantitative research findings on rape in South Africa’ Pretoria: Statistics South Africa, (2000) 1-3, available at <http://www.statssa.gov.za/publications/rape/rape.pdf>, accessed 4 June 2013; the report compares data provided by the Victims of Crimes Survey for 1997 and by the South African Police Service for 1998 and observed similarities in both sets of data. The police data indicated that conviction rates

reported cases of rape or attempted rape, but the rate was still disturbingly high at 52,550. Just above half of the victims were below 18 years and 7,898 were below 12 years.⁶⁵ However, rape fell in subsequent years. In 2009, the ratio stood at 100 crimes per population of 100,000, equalling 49,320 in actual figures. In 2013, the rate fell to 94.5 per population of 100,000 in 2012/2013.⁶⁶ In real terms however, and given population growth, the actual number of reported crimes moved from 49,320.5 in 2009 to 50,067.99 in 2013.⁶⁷ The figures may also have included male rape. In a 2003 publication, the South African Gender Violence and Health Initiative cited information provided in 2001 by the South African Police Service which reported 2,934 cases of ‘indecent assault on men’, of which 1,627 were reportedly perpetrated on minors.⁶⁸ In 2009, South Africa’s Medical Research Council (MRC) noted that 1 in 30 men were raped.⁶⁹ The MRC also analysed the crime in terms of the number of times an offender has committed rape; it reported that in 2008/2009, a male person was interviewed from each of 20 randomly selected South African households in each of three districts in the Eastern Cape and KwaZulu Natal. The results showed that 46.3 per cent of the men had ‘raped more than one woman or girl’.⁷⁰ Disturbing as these statistics may be, it ought to be borne in mind that sexual

for rape or attempted rape charges as a proportion of reported cases were 8.9 per cent. See generally pages 16-24 of report.

⁶⁵ Christofides, Webster & Jewkes et al, ‘The state of sexual assault services: Findings from a situational analysis in South Africa’ The South African Gender-Based Violence and Health Initiative (2003), 1, available at <http://www.mrc.ac.za/gender/sexualassault.pdf>, accessed 4 June 2013.

⁶⁶ South African Police Service ‘Crime statistics overview RSA 2012/2013’ available at http://www.saps.gov.za/resource_centre/publications/statistics/crimestats/2013/downloads/crime_statistics_presentaton.pdf, accessed 30 August 2014.

⁶⁷ South Africa’s population grew from 49,320,500 in 2009 to 52,982,000 in 2013. See Statistics South Africa ‘Mid-year population estimates 2009’ available at <http://www.statssa.gov.za/publications/P0302/P03022009.pdf>, accessed 30 August 2014; Statistics South Africa, ‘Mid-year population estimates 2013’ available at <http://beta2.statssa.gov.za/publications/P0302/P03022013.pdf>, accessed 30 August 2014.

⁶⁸ Christofides, Webster & Jewkes et al op cit note 65.

⁶⁹ Jewkes, Abrahams & Mathews et al, ‘Preventing rape and violence in South Africa: Call for leadership in a new agenda for action’ *MYC Policy Brief* (November 2009) available at http://www.mrc.ac.za/gender/prev_rapedd041209.pdf, accessed 4 June 2013.

⁷⁰ Jewkes, Sikweyiya & Morrell et al, ‘Understanding men’s health and use of violence: Interface of rape and HIV in South Africa’, Medical Research Council, University of KwaZulu Natal, and Emory University, available at <http://www.mrc.ac.za/gender/interfaceofrape&hivsarpt.pdf>, accessed 4 June 2013. According to the study, ‘23.2% of [the] men said they had raped 2-3 women, 8.4% had raped 4-5 women, 7.1% said they had raped 6-10 and 7.7% said they had raped more than 10 women or girls’. See page 24; See also Medical Research Council ‘Policy Brief’ (June 2009) available at http://www.mrc.ac.za/gender/violence_hiv.pdf, accessed 4 June 2009.

assaults are widely acknowledged to be underreported in South Africa,⁷¹ and that many reports acknowledge high HIV transmission risks in rape.

5.4.2 The Responses of Penal Policy to the Rape Crisis

The above statistics evoked concerns that instigated a tough crime policy response to rape by the legislature and judiciary. Judicial portrayals of the crisis were particularly poignant, as the following words from a recent decision of the Supreme Court of Appeal in *Mudau v The State*⁷² illustrates:

Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continue unabated. In *S v RO*, I referred to this extremely worrying social malaise, to the latest statistics at that time in respect of the sexual abuse of children and also to the disturbingly increasing phenomenon of sexual abuse within a family context. If anything, the picture looks even gloomier now, three years down the line. The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct.⁷³

Alive as the court was to the need for strong measures against rape offenders, it was equally conscious of its duty to moderate the quest for retribution. In its words:

It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge – the other sentencing objectives, including rehabilitation can never be discarded altogether, in order to attain a balanced, effective sentence.⁷⁴

Further along the judgment, the court held:

Crime has undeniably escalated alarmingly since this dictum, but while retribution remains a sentencing objective, this does not mean that disproportionate sentences may be imposed on offenders. As Prof S Terblanche has correctly pointed out:

. . . true retribution is effected only by the imposition of an appropriate sentence, by a sentence which is in proportion to what is deserved by the offender.⁷⁵

The caution expressed in the above statements was necessary. Prior to *Madau*, the South African legislature's initial response to the crisis was to include s 51 of the 1997 Act. In *Prins*,

⁷¹ See fn 60 and fn 70 supra.

⁷² (764/12) [2012] ZASCA 56 (9 May 2013).

⁷³ Ibid at 14.

⁷⁴ Ibid.

⁷⁵ Ibid at para 15.

the court described the provision as vital to South Africa's fight against sexual violence.⁷⁶ By the year 2000, sentencing for rape inclined toward longer incarceration.⁷⁷ Ten years later, Nugent JA⁷⁸ observed that sentences for rape had increased from the three to four years that used to be imposed before the 1997 Act was passed, to 10 to 20 years subsequent to the Act. This increase in the length of incarceration⁷⁹ signposted the era of 'punitive humanism' in South Africa – as discussed in chapter three; while the process of judicial ratiocination became suffused with well-articulated constitutional values that emphasized humane treatment (or punishments) for offenders, the epidemiology of violent crimes prompted judges to reach for the upper limits of prescribed penalties, apparently driven by deterrent and preventative objectives. However, reaching for the upper limits followed a chequered path that was attended by much criticisms of how courts have misapplied the 'substantial and compelling circumstances' clause. One of the critics, the Western Cape Consortium on Violence against Women (WCCVW), observed that judicial sentences did not reflect the severity that a crime with rape's epidemiological patterns deserves, and that sentences were inconsistent.⁸⁰

Other important policy responses occurred. Before the 1997 Act, sexual offences were governed by common law. They subsisted in two forms: rape and indecent assault. The common law defined rape as 'unlawful, intentional sexual intercourse with a woman without her consent'.⁸¹ The absence of consent was an essential element of the offence. A second essential element was that there must be penetration of the victim's vagina by the aggressor's penis.⁸² Other forms of sexual violence that did not involve this physical element fell outside the definition, but were criminalized as indecent assault. They typically attracted lesser punishments. Such other forms of sexual assault involving anal rape, the insertion of fingers or objects into the

⁷⁶ *Prins* supra note 3 at 186 para H. In *S v Malgas* supra, the SCA observed that s 51 signalled that sentencing for serious crimes as rape would no longer be 'business as usual'.

⁷⁷ The South African Law Reform Commission, after a quantitative and qualitative research into sentencing patterns before and after the 1977 Act was passed, reported that sentencing for rape did increase as a result of the Act. See South African Law Reform Commission op cit note 15.

⁷⁸ *S v Vilakazi* supra note 63 at 572 paras A-C.

⁷⁹ See Chris Giffard and Lukas Muntingh 'The effect of the size of the South African Prison Population' (2006) A Report Commissioned by the Open Society Foundation for South Africa Hannes Fagan 'Curb the vengeance: Laws on minimum sentences and parole spell worsening prison conditions (2004) *SA Crime Quarterly* 1 at 2.

⁸⁰ Western Cape Consortium on Violence against Women op cit note 28 at 7.

⁸¹ Burchell op cit note 4 at 217.

⁸² Francis J Ludes and Harold J Gilbert (eds) *Corpus Juris Secundum*, Vol. 75 (1952) 461-463.

vagina or anus, or sexual assault on male victims, did not fall under the common law classification of rape.⁸³

This restrictive definition of rape has been much criticised by feminists who argue that it excludes forms of sexual violence that are just as injurious as rape, even though no vaginal penetration is involved.⁸⁴ The definition has also been judicially criticized. In the 2006 case of *S v Masiya*⁸⁵ the court reasoned that the definition was founded on social values that were no longer valid in contemporary society. Its limitation to vaginal intercourse was offensive and in negation of constitutional and international obligations to ensure the dignity of all and to extend equal protection of the law to all without discriminating between the sexes. Thus, the court found that the common law definition not only failed to provide protection against unorthodox forms of rape (such as anal rape), it also engendered discriminatory sentences⁸⁶ and ignored rights that were violated by such crimes, such as the rights to bodily and psychological integrity and to privacy.⁸⁷ On the whole, the court agreed with a trail of judicial decisions that considered anal rape and vaginal rape to be equally serious, and denounced differentiations between the two as artificial.⁸⁸

The legislative response to these criticisms was the Criminal Law (Sexual Offences and Related Matters) Act 2007.⁸⁹ The Act was enacted to deal with all the legal aspects of the crimes

⁸³ See Jonathan Burchell and John Milton *Principles of Criminal Law* 3 ed (2005) Chapter 51; the development of the definition of the crime of rape is also evident in judicial decisions. In *R v Mosago and Another*, 1935 AD 32 at page 34 the Appellate Division held that 'rape is carnal connection with a woman (not his wife) without her consent'. This definition was adopted in the concurring judgment of Schreiner JA in *R v K* 1958 (3) SA 420 at 421. In 2006, the court noted in *S v Zuma* 2006 (2) SACR 191 at 205D that the definition of the crime, which was current at the time of the judgment, was unlawful and intentional intercourse with a female without her consent.

⁸⁴ Clare McGlynn op cit note 56; see also Pithey, Artz, & Combrinck op cit note 56. The authors argue that the legal definition of rape is narrow and excludes other forms of sexual crimes that are experienced as rape by women and men.

⁸⁵ *S v Masiya* 2006 (2) SACR 357 (T).

⁸⁶ Ibid at 378 paras G-H.

⁸⁷ Ibid at 378 para H – 379 para C.

⁸⁸ The court appeared to have endorsed the reasoning in *Director of Public Prosecution v Tshabalala* 2006 (2) SACR 381(T), where the High Court of the Transvaal Provincial Division held, in essence, that distinguishing between male and female rape did not serve a practical purpose and that moral blameworthiness of male rape was as substantial as blameworthiness for female rape. Accordingly, the court held that a six year old boy who was sodomised had in fact been raped. It also questioned the distinction created by the 1997 Act in relation to sentencing for vaginal rape and other forms of rape.

⁸⁹ No 32 of 2007.

in a single statute, in a manner that was not achieved by the 1997 Act.⁹⁰ It repealed the common law on rape and indecent assault, replacing them with new statutory definitions. By abolishing gender distinctions in sexual offences, the Act classified all forms of non-consensual sexual penetration as rape.⁹¹ It defined rape as an intentional and unlawful act of sexual penetration of a complainant without the complainant's consent.⁹² It also creates a class called compelled rape, applicable to a person who forces a third party to commit an act of sexual penetration with the complainant, to which neither the complainant nor the third party consented.⁹³ The common law crime of indecent assault was replaced by the statutory offence of sexual assault, and was made to apply to all forms of non-consensual 'sexual violation'.⁹⁴

A second legislative intervention was the Criminal Law (Sentencing) Amendment Act, 2007,⁹⁵ which inserted a new s 51(3)(a)(aA)(ii) into s 51 of the 1997 Act. The new provision excluded four conditions that courts had hitherto regarded as substantial and compelling justification for departure from the minimum sentence. These include the complainant's sexual history,⁹⁶ absence of physical injury to the complainant,⁹⁷ the accused person's 'norms, beliefs and customary practices',⁹⁸ or any relationship that existed between the accused and complainant

⁹⁰ See the explanatory note of the Act for a full statement of the purposes of the Act. In its preamble, the Act alludes to the fact that the country's common law and statutory law fail to deal adequately, effectively and in a non-discriminatory manner with several issues associated with the commission of sexual offences.

⁹¹ 'Sexual penetration' under s 1 of the Act includes penile penetration of the vagina, anus or mouth of another person and penetration by an object or any other part of the body of a person, or by any part of the body of an animal into the genital organ or anus of another person, or penetration by the genital organ of an animal into the mouth of another person.

⁹² Section 3.

⁹³ Section 4; Sexual assault and compelled sexual assault are defined in terms that correspond with the definitions of rape and compelled rape, the only difference being the absence of penile penetration. A third category of sexual assault was created, called self-compelled sexual assault. Here, a person compels another to perform sexual acts on him or herself without that person's consent. See ss 5, 6 & 7.

⁹⁴ The definition of s 1 under 'sexual violation' includes *inter alia*, (in)direct contact between the genital organ of a person, or breast in the case of a female, and any part of the body of another person or animal. It may also be contact between these parts of the body and an object.

⁹⁵ Act No 38 of 2007.

⁹⁶ The high court in *Mahomotsa* supra note 57 held the view that the complainant's previous sexual history was one of the mitigating factors that justified departure from the minimum sentence. The SCA disagreed with the view.

⁹⁷ In *S v Njikelena* 2003 (2) SACR 166 (C), the absence of a lasting physical injury was one of the mitigating factors that the court regarded as warranting departure from the minimum sentence.

⁹⁸ *S v Mvambu* (SCA) unreported case no 350/2003 of 29 September 2004.

before the commission of the crime.⁹⁹ The intervention, coming on the heels of decisions that had upheld the excluded factors as justifying departure, acknowledged the need for regulation regarding what subjective elements courts may or may not consider as substantial and compelling. The measure, or at least its underlying intention, could have enhanced greater consideration for the objective elements of the crime, over and above subjective factors over which opinions may differ considerably.¹⁰⁰

Of course, there is debate over whether subjective factors should be taken into consideration during sentencing. The traditional judicial position is to assert unfettered discretion to consider all factors – including subjective factors – that are relevant to determining an appropriate sentence. Thus, in *S v Nkawu*,¹⁰¹ the court queried the constitutionality of s 51(3)(a)(aA)(ii) because a literal interpretation of the requirement that absence of physical injury shall not be regarded as a compelling and substantial circumstance would obligate the court to disregard factors that are relevant to deciding proportionate punishments, and infringe the accused person's fair trial rights. This view was approved by the Supreme Court of Appeal in *Mudau v The State*.¹⁰² The judicial objection to the provision is understandable, given that the degree of physical injury is, to a considerable degree, an objective fact that bears directly on the seriousness of the crime and the damage occasioned thereby. In *Mudau* however, the court also seemed to have acknowledged the appellant's allusion to his employment and social status in its

⁹⁹ Ibid; see also *S v Abrahams* supra note 57, where a father raped his 14-year old daughter. During sentencing, the high court held the crime was less reprehensible in part because, as it would seem to have been suggested by the court, it was committed in a domestic context, and thus not fit for the minimum sentence. On appeal, the Supreme Court of Appeal doubted that a lower degree of reprehensibility was intended by the high court. Nonetheless, the WCCVW has noted that sentencing decisions generally seem to view sexual offences committed within familial contexts as less blameworthy.

¹⁰⁰ For example, there may be disagreement over the extent to which the offender's social or employment status should influence the sentence. Under the Minnesotan sentencing guideline – which apparently informed the adoption of s 51 – factors like '(a) race, (b) sex, (c) employment factors [which includes] occupation or impact of sentence on profession or occupation; employment history; and employment at time of offense; employment at time of sentencing, (d) social factors, [which includes] educational attainment, living arrangements at time of offense or sentencing; length of residence; marital status; and (e) the defendant's exercise of constitutional rights during the adjudication process' are neutral and would not justify departing from the minimum sentence. See Minnesota Sentencing Guidelines Commission 'Minnesota sentencing guidelines & commentary' (2013) 41-42, available at <http://mn.gov/sentencing-guidelines/images/2013%2520Guidelines.pdf>, accessed on 9 December 2014; see also chapter 6 below for this discussion.

¹⁰¹ 2009 (2) SACR 407 (ECG).

¹⁰² Supra note 72.

broadly cumulative appraisal of the substantial and compelling circumstances that obligated departure from the minimum sentence.¹⁰³ The problem with such cumulative appraisals will be mentioned shortly. Particularly pertinent at this point is the risk that courts run when they bring employment and social factors into consideration. A court that mitigates, rejects, or measures mitigation on the basis of an offender's employment, family or educational status engages in a discriminatory and potentially unconstitutional process, especially when the discrimination disadvantages one offender more severely than another who has been convicted of a comparable offence.¹⁰⁴

While one reason or the other may be offered to justify such discrimination – such as the need to take the interests of dependants who will be negatively impacted by the offender's sentence into consideration – the public dissatisfaction that has been instigated by judicial interpretations of s 51(3) cannot be overstated. Sentences have been impugned for circumventing the legislative intention behind the provision or for substituting the test in the provision for the court's own impressions of fairness. The WCCVW,¹⁰⁵ for example, has criticised courts for showing a tendency to depart from the *Malgas* guidelines and to impose sentences that fall below the minimum sentence. The discussion below explores the basis of the criticisms.

5.4.3 Applying the Malgas Principles

Early opportunities to refine and particularize the *Malgas* principles came before the Supreme Court of Appeal in *S v Abrahams*¹⁰⁶ and *S v Mahomotsa*.¹⁰⁷ Both cases involved appeals against sentences for rapes that were perpetrated on children who were less than 16 years old, which given s 51, was punishable with life sentences. However, using the *Malgas* principles, the court found that both cases exhibited substantial and compelling circumstances that warranted imposing a lesser sentence. In finding so however, the court articulated a principle of

¹⁰³ Ibid at paras 23-28.

¹⁰⁴ On this point, see Cassia C Spohn *How Do Judges Decide? The Search for Justice and Fairness* 2 ed (2009). Sage Publications, Thousand Oaks California, see generally chapter three of the book.

¹⁰⁵ Western Cape Consortium on Violence against Women op cit note 28.

¹⁰⁶ Supra note 57.

¹⁰⁷ Supra note 57.

proportionality not contemplated by the Act and possibly not even by *Malgas*. In *Mahomotsa* for instance, the Supreme Court of Appeal reasoned:

[I]t does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape delineated in the Act, a uniform sentence of either life imprisonment or indeed any other uniform sentence must or should be imposed. ... Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. ... [I]t is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in *S v Abrahams*... 'some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust'.¹⁰⁸

For support, the court cited the following dictum of Davis J in *S v Swartz and Another*¹⁰⁹:

As controversial a proposition as this is bound to be, not all murders carry the same moral blameworthiness, so, too, not all rapes deserve equal punishment. That is in no way to diminish the horror of rape; it is however to say that there is a difference even in the heart of darkness.

Indeed, the court's opinion that rapes crimes do not attract the same levels of culpability is persuasive. It reinforces the need for differentiations in the levels of culpability and for corresponding differences in penal severity as was reiterated in *S v Vilakazi*,¹¹⁰ where the Supreme Court of Appeal deplored the lack of gradation between sentences prescribed by s 51. The court also expressed the view that the provision wrongly lumps punishment for certain crimes into the same category of gravity, in a manner that could result in disproportionate penalties being awarded. However, even if it is admitted that the court rightly declared the statutorily mandated life sentences to be disproportionate to the crimes in *Abrahams* and *Mahomotsa*, something critical is still lacking. The court failed to offer a precise evaluation of

¹⁰⁸ *S v Mahomotsa* supra note 57 at 443 para H – 444 para B.

¹⁰⁹ *S v Swartz and Another* 1999 (2) SACR 380 (C).

¹¹⁰ Supra note 63 at 559 para D – 560 para H. The reasoning in this case was preceded by the decision in *R v Billam* [1986] 1 All ER 985, where the English Court of Appeal held that while rape was always a serious offence that demanded an immediate custodial sentence, different degrees of seriousness in the commission of the offence demanded different levels of penal severity. See Martin Wasik *Emmins on Sentencing* 2 ed (1985) 48. The court in therefore rightly criticised s 51 for failing to ensure that there is gradation between prison sentences for rape and life sentence for rape with aggravating features. According to the court, the failure ignored the fact that aggravating features could feature different levels of intensity and that moral culpability may not always be the same for offences that fall within the same statutory classification. To drive the point home regarding the absence of gradation, the court reasoned that it would be unconscionable to impose the same life sentence on a youthful first offender who rapes a child once and a 'recidivist serial rapist' who 'repeatedly gang-rapes' his disabled victim and knowingly infects her with HIV. The court also criticized other incongruities in s 51, such as the disproportions between sentences for various circumstances of rape and sentences for other crimes, which could result in grossly disproportionate and unconstitutional sentences.

how the mitigating and aggravating factors it took into consideration were weighted to produce the 12-year sentences it imposed. This makes it difficult to determine what factors prevailed in the choice of sentence. Not surprisingly, the WCCVW criticised the reasons for departure in both cases as glossing over the ‘substantial and compelling’ test in a manner that confused the jurisprudence, or even probably altered the *Malgas* test.¹¹¹

Here lies the predicament: decisions to depart from minimum sentences are taken using a less than methodical weighting process that is validated by the value that each sentencer attaches to aggravating or mitigating factors, as he or she perceives them in individual cases. This is almost re-enacting Selden’s sentiments about equity and the length of the Chancellor’s foot. Given the absence of a weighting system that allocates points to each factor, or some similar scheme for allocating value, it is uncertain whether courts weigh the factors individually or collectively. A description of how courts have considered aggravating and mitigating factors is necessary to illustrate such uncertainty and the need for a more precise weighting system.

5.5 Weighting Mitigating and Aggravating Factors

When *Malgas* held that reasons for departing from s 51 may also be found in traditional sentencing factors, it clearly suggested that courts may resort to the aggravating and mitigating factors they have traditionally¹¹² utilised to elevate or lower criminal liability. Applying the factors involves balancing the factual or objective seriousness of the offence against its subjective elements, such as the offender’s personal circumstances, or the actual harm caused by the offence. Applying itself to this balancing process in *Malgas*, the court found that the

¹¹¹ The WCCVW observed this ‘confusion’ again in *S v G* 2004 (2) SACR 296 (W), which also involved the rape of a minor. In that case, the court interpreted *Abrahams* and *Mahomotsa* as establishing the principle that minimum sentences were not mandatory and that courts may depart from them where substantial and compelling circumstances exist, or where, having regard to all the facts, the prescribed sentence would be disproportionate to the crime and therefore unjust. This, in other words, meant that ‘substantial and compelling circumstances’ need not be the reason for departure. The court must consider differences in seriousness as was done in *Abrahams* and *Mahomotsa*. Consequently, the court decided in *S v G* that the absence of the use of excessive force in the commission of the crime justified the award of a lesser sentence. See Western Cape Consortium on Violence against Women op cit note 28 at 5-6.

¹¹² The phrase ‘traditional aggravating and mitigating factors’ is used in the context on those factors developed in the application of the common law, prior to the enactment of s 51.

seriousness of murder, the presence of premeditation and common purpose¹¹³ and the fact that the victim was defenceless, aggravated liability. On the other hand, the following had mitigating effect: the appellant was relatively young; she was vulnerable and exploitable, and had been coerced into committing the crime by someone with an overbearing personality; she was remorseful soon after and spontaneously reported the crime, bringing it to light; she had no criminal record; she derived no personal benefit from the crime; and, lastly, she had high prospects of being rehabilitated.¹¹⁴ These examples are not exhaustive; different genres of crime may require nuanced approaches to balancing the factors. Generally though, subsequent decisions have followed the *Malgas* example of juxtaposing factors that elevate or lower liability.¹¹⁵

In *S v Mahomotsa*,¹¹⁶ the seriousness of the offence, the offender's brazenness and the fact that he exploited a relationship of trust or position of power were all held to be aggravating.¹¹⁷ In a number of cases, the presence of lasting physical, emotional, psychological or other injury on the victim and the threat or use of actual force,¹¹⁸ or the fact that the victim is below 16 years have also been held to be aggravating factors in rape.¹¹⁹ Examples of mitigating factors include the absence of serious violence or threat of violence, of lasting physical injury or injury beyond such as is inherent in rape,¹²⁰ and the offender's youthfulness and personal circumstances.¹²¹

¹¹³ Common purpose is said to be present where two or more individuals agree to embark on a joint criminal venture, or are active accomplices in a criminal venture. Under the doctrine, each accomplice becomes liable for the actions of other accomplices that occur within their common design. See Managay Reddi 'The doctrine of common purpose receives the stamp of approval' (2005) 122 *S. African L.J.* 59-66; see also *S v Safatsa* (1988) 1 SA 868 (A) at 898 para A.

¹¹⁴ *S v Malgas* supra note 8 at 1238 para H - 1239 para B.

¹¹⁵ On this point, see also *S v Sikhipha* 2006 (2) SACR 439 (SCA) at 445 para E-F.

¹¹⁶ Supra note 57.

¹¹⁷ See also *S v Abrahams* supra note 57; *Mudau v S* supra note 72.

¹¹⁸ *S v Mahomotsa* supra note 57; *S v Abrahams* supra note 57; *S v Vilakazi* supra note 63.

¹¹⁹ *S v Abrahams* supra note 57.

¹²⁰ Violence in this context means extraneous violence. The sense in which the qualification is used is that force beyond what is necessary must have been employed to perpetrate the crime. The qualification acknowledges that rape is in itself an act of physical violence. Force is extraneous when for example, it involves physical assault on the victim. See *S v Vilakazi* supra note 63; *S v Mahomotsa* supra note 57.

¹²¹ *S v Mahomotsa* supra note 57 at 444 paras E-F. However, in *S v Vilakazi* supra note 63 at 574 paras C-F, the court held that where the offence is serious, 'the personal circumstances of the offender, by themselves, will necessarily recede into the background'. They may however be relevant with respect to whether the offender may be expected to recidivate. The court considered that his stable employment and family status did not indicate that the appellant had an 'inherently lawless character'.

Personal circumstances include those subjective elements that may have predisposed the offender to the crime. These include a dysfunctional family background or upbringing, poverty and the offender being a victim of sexual abuse, amongst others. It has also been held to be a mitigating factor when the offender utilises a condom as a precaution against pregnancy or transmitting disease,¹²² or is of middle age and has no criminal record,¹²³ or is married, has children and is employed.¹²⁴

As noted earlier, courts attach different weights to these factors, using their perceptions of the gravity of the crime. While such differences are to be expected in a discretion driven sentencing system, failure to rationalise the discretionary function involved can result in contradictions. An analysis by Terblanche and Roberts,¹²⁵ of the Supreme Court of Appeal's decision in *S v Ferreira and others*¹²⁶ illustrates the point. Three judicial opinions in that case imposed three widely conflicting penalties using the same principles. Such incongruity, argued the authors, stems from the fact that courts have to balance the triad in sentencing and find a way in which the selected penalty will serve the purposes of punishment.¹²⁷ How and whether all of these purposes should be funnelled into the punishment 'is a matter of conjecture and much difference and variance of application'.¹²⁸ According to Terblanche and Roberts:

There is much to be said for these principles. It allows the court to make a true assessment of the seriousness of the offence, to bring the personal circumstances of the offender into consideration, and to have regard for the interests of society. The crime is the factor that set the

¹²² *S v Vilakazi* supra note 63 at 573 para B.

¹²³ *S v Abrahams* supra note 57.

¹²⁴ On the mitigating effects of marriage, parenthood and employment on sentencing, see Terblanche & Roberts op cit note 24 at 199. The authors wrote that courts generally give the impression that these factors mitigate sentence, but that it is hard to find actual cases in which punishments were reduced on these accounts. A possible explanation comes from a problem that the authors acknowledged in the article, that courts discuss the basic principles of sentencing and move on to the facts of the case. 'No intermediate set of principles have been developed' that would show, for instance, how a mitigating or aggravating element influences the choice or quantum of punishment.

¹²⁵ Ibid at 189.

¹²⁶ 2004 (2) SACR 454 (SCA); this case involves sentencing for murder. The reality of variations in judicial perceptions about the seriousness of a crime and the effect of circumstances that attended to its commission were acknowledged in *Malgas*, when the SCA held that an appeal court should not interfere with the sentencing discretion of the trial court merely because it prefers another sentence. In the absence of a material misdirection on the part of the trial court, resulting in the award of a disturbingly disproportionate sentence, the sentence of the trial court must stand. In other words, differences in the measure of punishment that different judges would consider appropriate in a given case, are to be expected. Problems would arise where the judge's discretion results in excessive punishment. See also *S v Barnard* 2004 (1) SACR 191 (SCA) at 194 paras B-D.

¹²⁷ Ibid at 198; the author meant 'the purposes of deterrence, prevention, rehabilitation and retribution'.

¹²⁸ Ibid.

whole criminal process in motion -- there is no way in which it could ever be disregarded. The offender and society are the true parties involved in the crime, and the victim(s) are not forgotten either, because society's interests are only served when the interests of the victims are paramount. Unfortunately, the courts have not made the most of these principles.¹²⁹

The authors then conclude that judges have adopted an unhelpful intuitive approach to sentencing.¹³⁰ The problematic nature of the approach was also revealed in the divergent opinions in the appellate decision in *S v Nkomo*,¹³¹ where the high court imposed a life sentence on the appellant after finding no basis to depart from the minimum life sentence. On appeal, the Supreme Court of Appeal conducted the usual balancing exercise. With regards to aggravation, the court noted – in obvious allusion to the worst cases of rape ‘principle’ in *S v Abrahams* – that it could not imagine rape under worse conditions.¹³² On the other hand, the appellant’s youth (29 years at the time of committing the offence), the absence of a criminal record, the fact that he was employed and had three dependants were admitted in mitigation of sentence. The court also formed the belief that the appellant had a probable chance of being rehabilitated, though it observed that no evidence was led to that effect.

In South African sentencing jurisprudence, how courts allocate weights to each aggravating and mitigating factor is not so clear. In *Nkomo* the court relied on sentencing patterns to arrive at a 16-year prison sentence, which it believed was appropriate. It cited *Mahomotsa*, where the Supreme Court of Appeal imposed an effective sentence of 12 years for two counts of multiple rapes,¹³³ and *S v Sikhapha*,¹³⁴ where the same court reversed a life

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ 2007 (2) SACR 198 (SCA).

¹³² Specifically, the features that the court considered to be aggravating include the abduction and rape of the complainant, while holding her captive overnight; dragging her back into captivity and repeatedly raping her after she suffered a fall that left her injured after a failed attempt to escape; forcing the complainant to perform oral sex on him and physically assaulting her when she resisted; stripping the complainant and taking her clothes away to prevent her from leaving; and lastly, the appellant’s lack of remorse for his actions. The fact that the appellant had an education and a job, which placed him in a comparatively better position than the complainant, was also treated as an aggravating factor. Of all the cases that have been reviewed in the course of this research, this is the only case where these factors had an aggravating effect in sentencing for rape. The trend has been to consider them as mitigating. However, it is hard to tell what particular effect the factors had on sentencing in the case, for the reasons offered by Terblance and Roberts.

¹³³ In *Mahomotsa* supra note 57, the court examined previous sentencing decisions in similar cases to determine what was traditionally imposed for rape. These decisions include *S v Gqamana* 2001 (2) SACR 28 (C) where a 23 year old who raped a 14 year old complainant, thinking she was 18 years, was sentenced to eight years. The aggravating factors included the fact that the offender used threats, raped the complainant twice and locked her up in

sentence for the rape of a 13 year old girl, imposing 20 years instead. In *Sikhipha*, the absence of serious injury to the victim, the possibility that the appellant could be rehabilitated and the fact that he was 31 years old during the trial, practiced a trade, and had a wife and children who were dependent on him, were all regarded as ‘substantial and compelling circumstances’ that justified departure from the minimum life sentence.

Beyond intuition, the examples that *Nkomo* relied on did not offer logical explanations regarding how aggravating and mitigating factors translated into the quantum of punishments that the court imposed in those cases. While intuition (or perceptions) may not be completely ruled out because of necessary value judgments that must be made, relying on it is hardly sufficient and is prone to produce sentences that are neither rational nor evidenced based.¹³⁵ The reasoning process in the decisions that *Nkomo* relied on were more intuitive than rational, or even empirical.¹³⁶ The same intuitive process formed the basis of sentencing in *Nkomo*; beyond the necessary attempt that the court made to differentiate and particularise the *Malgas* principles, no logical explanation was offered regarding why sentence had to be mitigated to the extent that it was. The court held that the absence of a weapon, the relative youthfulness of the offender, the absence of a criminal history and the prospects of rehabilitation, were mitigating, even though the court had said it could not imagine a worse instance of rape. Not surprisingly, Theron AJA strongly dissented with the court’s reasons for interfering with the lower court’s sentence:

This court in *S v Abrahams* and *S v Mahomotsa* recognized that while all rapes are serious, ‘some rapes are worse than others’. In my view, the rape of the complainant is one of the worst imaginable. If life imprisonment is not appropriate in a rape as brutal as this, then when would it be appropriate? I am of the view that this is precisely the kind of matter the legislature had in mind for the imposition of the minimum sentence of life imprisonment. Courts must not shrink

his shack. The fact that the victim was a minor – though he claimed to have through she was 18 years old – was considered an aggravation. The mitigating factor was that the offender had no criminal record. The second case the court referred to was *S v Abrahams* supra note 57, where for raping his less than 16 year old daughter, the Supreme Court of Appeal imposed a 12-year prison sentence on the defendant. The issue with these decisions however, is that they followed the intuitive process that Terblanche and Roberts criticized.

¹³⁴ 2006 (2) SACR 439 (SCA).

¹³⁵ Richard E Redding ‘Evidence-based sentencing: The science of sentencing policy and practice’ (2009) Vol. 1 No. 1 *Chapman Journal of Criminal Justice* 1.

¹³⁶ Ibid; the sense in which the words ‘rational’ and ‘empirical’ are used connotes sentences that can be verified on the basis of evidence. See discussion in chapter 6 section 2.1.5.

from their *duty* to impose, in appropriate cases, the prescribed minimum sentences ordained by the legislature.¹³⁷

Theron AJA also did not think that the court's intervention met the need to respond to rape crimes with a measure of severity that satisfied expectations:

Against the backdrop of the unprecedented spate of rapes in this country, courts must also be mindful of their duty to send out a clear message to potential rapists and to the community that they are determined to protect the equality, dignity and freedom of all women. Society's legitimate expectation is 'that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because [substantial and compelling] circumstances are, unwarrantedly, held to be present'.¹³⁸

In conclusion, Theron AJA, following what she called the *Malgas* approach 'of balancing societal and personal interests', held that the totality of the facts did not constitute substantial and compelling circumstances.¹³⁹

What emerges from the foregoing discussion is that habitual resort to the *Malgas* principles has not guaranteed sentencing consistency. Neither have the principles satisfied the quest for proportionality. When judicial sentences for rape are examined, a telling tale of disproportionality and inconsistency unfolds. One reason for this, according to Terblanche and Roberts, is that courts are reluctant to actively probe and obtain accurate information on which sentencing decisions ought to be predicated, in order not to be seen as 'descending into the arena'. True to this observation, South African courts have often deplored the paucity of sentencing evidence, and then proceeded nevertheless to decide a punishment.¹⁴⁰ The tendency to prod on to resolve questions that arise from the lack of accurate or adequate information, apparently prompted Terblanche and Roberts¹⁴¹ to caution that courts should not 'fall back on mere speculation to resolve the question' regarding what would be an appropriate sanction.

¹³⁷ *S v Nkomo* supra at 207 note 131 para A-B.

¹³⁸ *Ibid* at paras B-D.

¹³⁹ Theron AJA rejected the notion that the offender's youthfulness and absence of a criminal record, or employment could on their own, provide enough reasons to depart from the minimum sentence. In her words, 'there is hardly a person of whom it can be said that there is no prospect of rehabilitation. The appellant was 29 years old at the time and would ordinarily not be regarded as a youthful or immature offender. Employment in itself would not necessarily qualify as a substantial and compelling circumstance'. See *S v Nkomo* supra note 131 at 207 paras E-F.

¹⁴⁰ *S v Vilakazi* supra note 63 at 573 para D – 575 para A; *S v Mudau* supra note 72 at para 25.

¹⁴¹ Terblanche and Roberts op cit note 24 at 197-198.

In Kubista's¹⁴² helpful analysis on the subject, the problem originates in a hybrid judge-made scheme for sentencing, in which courts utilise pre s 51 (traditional) sentencing techniques as a basis for departure from mandatory minimums. The hybrid scheme allows courts to 'misuse the subjective severity of the crime as a mitigating factor',¹⁴³ while jettisoning the legislative goal of establishing an objective basis for measuring offence gravity. This preference for judicial discretion over the objective standards of the legislation has grown 'a rape jurisprudence that minimises the inherent violence of rape',¹⁴⁴ and 'could have long-term negative effects on sentences for rape'.¹⁴⁵ She noted further how sentencing decisions (*Abrahams* and *Mahomotsa* in particular) that have followed the *Malgas* principles created subcategories of gravity ranging from minor to heinous rapes, which were not contemplated by the 1997 Act.¹⁴⁶ In her words:

The Supreme Court of Appeal increased the sentences of the accused in both *Abrahams* and *Mahomotsa*. Still, these cases demonstrate the process of judicial categorization of rape, where the court imports a false benchmark standard into the definition of rape contained in Part I of Schedule 2. This means that any crime scenario which does not meet the judicially created benchmark can be seen as a situation for which the imposition of the guideline sentence would be unjust, since the crime committed is less deviant than those envisaged by the legislature. In other words, by creating a false high-water mark, the courts excavate an enormous space where 'substantial and compelling circumstances' to depart from mandatory minimums may dwell.¹⁴⁷

Traditional factors that courts rely on ought not to justify departure from minimum sentences when they would have the effect of minimising the objective gravity of the offence, or undermining s 51 – including the legislative intention of treating rape as an inherently violent crime¹⁴⁸ that should be dealt with severely. Similar criticisms have been echoed elsewhere. According to O'Sullivan and Murray¹⁴⁹ 'some judges revert to stereotypical assumptions about women and rely on rape myths' in order to circumvent s 51's minimum sentences. Van der

¹⁴² Kubista op cit note 1 at 81.

¹⁴³ Ibid at 77.

¹⁴⁴ Ibid 81.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid at 82-83.

¹⁴⁷ Ibid at 83.

¹⁴⁸ Ibid at 83-84. The author illustrates with the examples of *S v Njikelana* 2003 (2) SACR 166 (c) and *S v Gqamana* supra, where the facts showed that the accused person's conduct came within the purview of s 51. She argued that the emphasis in both cases on additional violence beyond what was implicit in rape itself permitted the court 'to depart from the guideline'.

¹⁴⁹ Michelle O'Sullivan & Christina Murray 'Brooms sweeping oceans? Women's rights in South Africa's first decade of democracy' in Christina Murray and Michelle Sullivan (eds) *Advancing Women's Rights: The First Decade of Democracy* (2005) 1-41 at 10.

Merwe's¹⁵⁰ views sum it up: courts have inverted the *Malgas* principle that the minimum sentences should be the ordinarily appropriate, replacing it with the rule 'that if it is not one of the worst cases, life imprisonment will not apply. By implication, the prescribed sentence of life imprisonment in rape cases will therefore ordinarily be departed from'.¹⁵¹

5.6 The Judicial Response to Criticisms and Problems that are Implicit in Section 51's Allocation of Penalties

Not to be lost in this discussion is the fact that the Supreme Court of Appeal has acknowledged the inconsistencies illustrated above. In *Mudau v S*¹⁵² for example, the Supreme Court of Appeal acknowledged the conflicting opinions in *Nkomo*¹⁵³ and the widespread criticism that followed that decision, but it blamed inconsistencies on legislative interference with sentencing discretion. Taking this sentiment further in *S v Vilakazi*¹⁵⁴ the court subjected s 51 to the following criticism:

It requires only a cursory reading of the Act to reveal other startling incongruities. And when the sentences that are prescribed for rape in various circumstances are related to sentences prescribed for other crimes even more incongruities emerge. It is not surprising that the leading writer on the subject of sentencing in this country, Professor Terblanche, advanced the following acerbic observation on the Act ten years after it took effect:

I have criticised the Act elsewhere and, if anything, have become more critical with time. There is hardly a provision in sections 51 to 53 that is without problems. The number of absurdities that have been identified and which will no doubt be identified in future is simply astounding. The Act's lack of sophistication disappoints from beginning to end. There are too many examples of disproportionality between the various offences and the prescribed sentences.¹⁵⁵

The frustration that the above statement communicates is palpable and one can hardly disagree with its logic. As pointed out earlier,¹⁵⁶ sentencers resort to skirting statutory punishments when they believe that they are unduly severe and therefore unjust. Based on the

¹⁵⁰ Annette Van de Merwe 'Children as victims and witnesses' in Trynie Boezaart (ed) *Child Law in South Africa* (2009) 563-586.

¹⁵¹ Ibid at 583.

¹⁵² Supra note 72 at para 16.

¹⁵³ Supra note 131.

¹⁵⁴ Supra note 63.

¹⁵⁵ Ibid at 559 para G – 560 para B.

¹⁵⁶ See chapter 3 section 2.3 above.

views expressed by Terblanche and Roberts,¹⁵⁷ however, the real problem lies in the absence of intermediate principles that would show for instance, how a mitigating or aggravating element influences the choice or severity of punishment. Elsewhere, Terblanche argued that ‘there is little ... principled guidance for sentencing for rape, apart from general acceptance that it is a very serious offence’.¹⁵⁸ This, as noted earlier, has led South African courts to hypothesize when evaluating a rape crime, or the impact it has had on the victim. Two problems emerge from hypothetical evaluations of victim impact. First, it highlights the probability that the court may understate victim impact. Secondly, it raises the possibility of mitigating sentence on a highly rebuttable supposition that the victim showed no lasting signs of trauma. This approach is unfairly discriminatory. It assumes, without a scientific basis, that a victim who shows obvious signs of rebounding quickly was not as badly affected as the one who wallows in the trauma of rape. Such thinking has the tendency of minimizing the gravity of rape.

In the 2011 case of *S v Matyityi*¹⁵⁹ the Supreme Court of Appeal attempted a more constructive response to criticisms of inconsistent applications of the ‘substantial and compelling circumstances’ test. The respondent in this case was convicted of rape and murder, which he committed with other co-offenders. The convictions fell within s 51, but the trial court considered the relative youthfulness of the offender (he was 27 years at the time the offence was committed) and his expression of remorse during trial as substantial and compelling factors that justified departure from the minimum life sentence. Accordingly, it imposed an effective sentence of 20 years’ imprisonment for rape and murder. The Supreme Court of Appeal rejected the lower court’s reasons for departure and held that the objective gravity of the offence and its prevalence, including the brazen brutality and leading role the respondent played while committing the offences, besides other aggravating factors, ruled out any basis for mitigation. Accordingly, it substituted the lower court’s sentence with life sentences.

Two things stand out in the appellate court’s decision. First, the court iterated the need for a more balanced sentencing approach that places adequate and precise information pertaining to

¹⁵⁷ Terblanche and Roberts op cit note 24 at 199.

¹⁵⁸ SS Terblanche ‘Rape sentencing with the aid of sentencing guidelines’ (2006) XXXIX *CILSA* 1-38 at 31.

¹⁵⁹ 2011 (1) SACR 40 (SCA). There was also a conviction and sentence for robbery. However, the appeal was against the sentence for rape and murder.

the accused and the victim at the court's disposal. In other words, courts should hypothesise less and exercise discretion rationally. Not only would precise information enhance the objective gravity of the offence, it would also make victim impact more assessable, thereby creating a proper sense of balance that enriches the court's analysis and enhances proportionality.

Proportionality is impeded when – as is often the case – sentencing information focuses more on the offender, foisting as it were, information asymmetries on the court. It leaves the court with half the information it needs to exercise discretion judiciously¹⁶⁰ and potentially diminishes the objective gravity of the offence. Secondly, the court decried the eagerness and frequency with which sentencing courts depart from minimum sentences and subvert the legislative intention behind s 51, usually for flimsy reasons that do not hold up to scrutiny, or for 'vague, ill-defined concepts ... and other equally vague and ill-founded hypothesis that appear to fit the particular sentencing officer's personal notion of fairness'.¹⁶¹ One of such vague concepts that the court rejected – but which had mitigated sentence in its previous judgments¹⁶² – is 'relative youthfulness'. These observations led the court to reassert the *Malgas* guideline, insisting that sentencing courts must act within the boundaries of its powers and defer to the legislative intention behind the adoption of minimum sentences.¹⁶³ It held that the only reason for departure ought to be 'truly convincing'.¹⁶⁴

Thus, *Matyityi* both offered an important restatement of how courts should approach s 51, as well as a timely caution against misapplying (or devaluing) the *Malgas* guidelines. By urging a proper balance between information pertaining to victim impact and the offender, the court idealised a scheme that potentially enhances a more judicious exercise of discretion and could reduce margins of disproportionality. However, when all has been said and done, the function of evaluating 'substantial and compelling circumstances' through traditional aggravating and mitigating factors essentially remains discretionary and the scheme remains more of an idea than a methodical guideline. Notwithstanding the important restatement of the *Malgas* principles and the need for balanced approach to sentencing, *Matyityi*'s approach to weighing aggravating and

¹⁶⁰ Ibid at 48 para C – 50 para A.

¹⁶¹ Ibid at 53 paras B-F.

¹⁶² *S v Mahomotsa* supra note 57 at 444 para E.

¹⁶³ *S v Matyityi* supra note 159.

¹⁶⁴ Ibid.

mitigating factors did not follow any particularly different trajectory from how courts had traditionally weighed the factors. Its approach was still intuitive. Besides, *Matyityi* did not segregate the offences for which it awarded sentences in order to illustrate how aggravating factors elevated the sentence for each offence. This makes it difficult to determine the extent to which any combination of aggravating factors impacted the sentence for rape especially. This desegregated approach raises cogent questions. First, was the rape sentence influenced in any way by the fact that a brazen act of murder arose from the same criminal transaction? Secondly, and having regard to the pattern of sentences that the Supreme Court of Appeal has imposed for rape, would the court have found a reason to depart from the minimum sentence if the murder did not occur? Unfortunately, *Matyityi* does not yield answers to these questions.

To conclude this discussion on sentencing for rape in South Africa, it must be observed that over and beyond criticisms that courts avoid minimum sentences, a substantial problem emerges from s 51's failure to provide a mechanism for progressively increasing penal severity for rape crimes where differences in offence seriousness can be factually or objectively drawn. As *Vilakazi* rightly noted, courts are confronted with a proportionality and fairness dilemma when they are required to impose sentences that do not differentiate levels of offence gravity. To redress this situation, an amendment may be necessary, which further differentiates between rape crimes in terms of objective gravity and clearly specifies those aggravating circumstances in which a life sentence will be more likely than not.

5.7 A brief Observation about Sentencing Factors in Nigeria

As pointed out earlier in this thesis, unlike South Africa, there is little explicit judicial reasoning that goes on when Nigerian courts impose sentences. Sentencing, as it has also been pointed out, is the least developed aspect of Nigeria's criminal jurisprudence. Although courts have itemised what principles need to be considered in sentencing, there is little jurisprudence surrounding the development and application of those principles.¹⁶⁵ This imposes a serious limitation on any enquiry into the 'science' or 'art' of sentencing in Nigeria. Nevertheless, it is possible, and

¹⁶⁵ See discussion in chapter 1 section 4 and chapter 2 section 3.

pertinent' to recognise that Nigerian courts have identified and used sentencing factors. This section considers how these factors feature in Nigerian's sentencing scheme. It has been noted that Nigerian courts generally claim to fit the punishment to the offender, his crime and the interests of society, and to allow adjustments necessitated by aggravating and mitigating factors.¹⁶⁶ Unfortunately, their ability to achieve a proportionate balance is constrained by rigid adherence to statutory penalties and the absence of a moderating constitutional principle.

Examples of factors that have been held to be mitigative include youth¹⁶⁷ or old age, the poor health of the offender, absence of a criminal record and demonstration of remorse or admission of guilt.¹⁶⁸ Having an education or not having one and playing a minor role in furtherance of a common purpose may also mitigate sentence.¹⁶⁹ The fact that the offender and victim are members of the same family may also result in sentence reduction in order to mitigate the consequences the crime and the punishment may have on the victim.¹⁷⁰ On the other hand, the seriousness of a crime, the brutality or callousness with which it was committed and the use of force with intent to cause grievous bodily harm, may enhance the severity of punishment or diminish the influence that a mitigating factor, such as being a first offender, could have on the sentence.¹⁷¹ Before the Robbery and Firearms (Special Provisions) Act 1984 was enacted, the use of violence or arms during robberies prompted courts to increase the length and severity of prison sentence.¹⁷² By virtue of the Act however, armed robbery became punishable with a mandatory death sentence. Abusing a position of trust, the prevalence of a crime, or playing a

¹⁶⁶ *Onyilokwu v Commissioner of Police* 1981 (2) NCR 49 at 55, the court held that 'a trial court is bound before punishment to consider many factors, such as the seriousness or otherwise of the offence, the rampancy of the offence, the [remorsefulness] shown by the convict, whether the convict is a first offender or an incorrigible recidivist, and the prevailing attitude of the populace to the offence of that kind'.

¹⁶⁷ *Commissioner of Police Mid-Western State of Nigeria v Oruware* (1974) A.N.L.R 627; by law, minors (persons below seventeen) cannot be sentenced to death. Under the Child Rights Act, a child is a person below the age of eighteen and shall not be subjected to criminal justice processes or criminal sanctions. See *Uwa v The State* (1965) A.N.L.R 372.

¹⁶⁸ *Anastasius Uwakwe v The State* (1974) A.N.L.R 557; see also J. Nnamdi Aduba 'Some mitigating and aggravating factors in Nigerian sentencing practice' (Undated) 3-6, 9-10 available at <http://www.researchgate.net/publication/40439860>, accessed 13 January 2015.

¹⁶⁹ Aduba op cit note 168 at 10-11.

¹⁷⁰ Ibid at 11-12; see generally pp 3-12 for the author's discussion of mitigating factors in Nigerian sentencing.

¹⁷¹ Ibid at 12.

¹⁷² By law, prison sentences are with hard labour, unless the court specifies otherwise. See section 377 of the Criminal Procedure Act; see also Peter A Anyebe 'Sentencing in criminal cases in Nigeria and the case for a paradigmatic shifts' *NIALS Journal on Criminal Law and Justice* Vol. 1 2011 151-196 at 168.

lead or major role in the crime also aggravate sentence. Likewise previous convictions; the mere presence of a previous conviction, whether or not it was for a similar offence as the current conviction, is an aggravating factor.¹⁷³

The cases suggest that Nigerian courts have applied these factors to conceivably much the same effect as their South African counterparts even though unlike the latter, they offer little to digest in terms of the reasoning behind the application of the factors. However, Nigerian courts have also developed an approach that responds to sensibilities in particular social contexts. For example, in criminal suits where the defence of provocation is pleaded, courts have applied the meaning assigned to the provocative words by ‘the ordinary reasonable man’ of the offender’s station. Thus, where a woman called her devout Muslim husband a pagan,¹⁷⁴ or mocked her husband’s impotence,¹⁷⁵ the defendant was allowed to plead provocation, resulting in a substitution of charges of murder with manslaughter and a consequential reduction in sentence.¹⁷⁶ In *Uwa v The State*¹⁷⁷ where an appeal against a death sentence depended on a proper determination of the age of the appellant at the time he committed the offence, the court resorted to the native Igbo (or Ibo) calendar to determine that a boy who would have been 13 years old under the Gregorian calendar, and thus liable to the death sentence, was still below that age when the offence was committed.¹⁷⁸

¹⁷³ Aduba op cit note 168 at 12-16.

¹⁷⁴ *Adamu Kumo v The State* (1967) A.N.L.R 309.

¹⁷⁵ *The State v Osunmili Ewho* (1969) A.N.L.R. 503.

¹⁷⁶ Admittedly, the case was more about charge mitigation than sentencing mitigation. However, it is useful to not overlook the mitigating effect that this had on the sentence and how that outcome was achieved through contextual analysis of the meaning of words.

¹⁷⁷ Supra note 167.

¹⁷⁸ Ibid at 374. The court held as follows:

[W]hat does an Ibo villager mean when he says he was 13 when baptized? An English boy who says he is 13 means that he has had 13 candles on his birthday cake – that he has had the 13th anniversary of his birth ... an Ibo villager who says he is 13 may well be out by several months, and it is well known to two members of the court that Ibo villagers reckon their age by certain festivals, and that the result may well be that an Ibo boy who says he is 13 is only 12 and a bit but has not attained the age of 13 in the English sense. And one may add that when a Cypriot boy says he is 13 he really means that he has attained the age of 12 and is in his 13th year – on the way to 13 but not yet there. Thus it is probable that the appellant when baptized was 12 really and on the way to 13 but not 13 yet. The appellant [also] said [he was baptised] in 1960, which might mean any month between January and December; but this would make a great difference to his age for the purpose of sentence.

These examples indicate how social contexts may inform the weight that accompanies an aggravating or mitigating factor. Taking these contexts into consideration potentially ensures that the sentence reflects the entire circumstances surrounding the commission of the crime. However, the lingering problem – as pointed out in *Onyilokwu v Commissioner of Police*¹⁷⁹ – is that courts characteristically do not give enough thought to sentencing principles, or to proportionate values that may be assigned to the objects of punishment. A cursory survey of sentencing for rape cases illustrate this predicament.

5.7.1 The Approach of Nigerian Courts to Sentencing for Rape

The characteristic failure described above is exemplified in sentencing for rape crimes in Nigeria, but first, to look at the social context within which such sentencing occurs. Like their South African counterparts, judges of Nigeria's Supreme Court have expressed concerns over the pervasive and invidious nature of the crime, and pointed out the need for punishments that correspond with the seriousness of the crime. Some of these comments were made against the backdrops of a growing number of girl children who were becoming victims of rape crimes, called the offence of defilement in Nigeria¹⁸⁰ - and the tendency of courts to visit the crimes with light sentences. Thus, in *Ndewenu Posu & Anor v The State*,¹⁸¹ the Supreme Court of Nigeria expressed the following opinion, per Adekeye JSC:

I cannot be remark that the sentencing policy of judicial officers need to be revisited. The purpose of the criminal law is to prevent harm to the society. The offence of rape is by every standard a grave offence which often leaves the victim traumatised and dehumanised. A light sentence as in the case of the appellants must never be imposed. This may have the unsavoury effect of turning rape into a pastime by flippant youths.

The two defendants in this case were convicted for conspiracy to rape and rape, and subsequently sentenced to one and three years' imprisonment respectively, to run concurrently. Under the South African minimum sentencing rules, a crime of this nature, perpetrated by two in

¹⁷⁹ Supra note 166.

¹⁸⁰ See section 218 of the Criminal Code Act; see Amstrong Ukuoma *Child Marriage in Nigeria: The Health Hazards and Socio-Legal Implications* (2014) 59.

¹⁸¹ 2011 Legalpedia SC NBIW.

the prosecution of a common purpose, would have attracted a life sentence, as the minimum sentence ordinarily applicable, unless substantial and compelling circumstances justified departure. Section 358 of the Criminal Code Law of Ogun State¹⁸² under which both defendants were prosecuted, makes the perpetrators liable to life imprisonment, with or without caning. This gives the sentencer considerable discretion in calibrating punishment. In this case, the lower court imposed three years' imprisonment for rape. Since this sentence was not challenged on appeal, the Supreme Court affirmed it, howbeit after first bemoaning the lightness of the sentence, and the fact that it was not challenged. However, the court did not offer a template or dictum regarding how trial courts ought to engage with sentencing for such crimes. It probably would have considered it academic, since it was never raised on appeal. Nevertheless, it would have been a worthwhile exercise, having regard to the court's precedent or standard setting role, and to important roles that the English Court of Criminal Appeals has fulfilled in issuing guideline judgements to regulate sentencing discretion. The court's roles in this regard will be discussed in chapter six.

Notwithstanding instances of self-restraint that Nigerian appellate courts have exercised regarding interfering with sentencing decisions in criminal appeals, it is noteworthy that the Supreme Court is coming to terms with the growing rates of sexual offences in Nigeria, the fact that it targets children in growing numbers, and the need for a sufficiently deterrent policy measure. *Boniface Adonike v The State*¹⁸³ was a 2015 Supreme Court decision in which the appellant sexually defiled (raped) a five year old girl, and was sentenced to six years imprisonment with hard labour and six strokes of the cane. There was no appeal against this sentence,¹⁸⁴ prompting the Supreme Court to uphold it. Nevertheless, this was one case that drew the court's attention to the need for a clear and consistent sentencing policy. In the court's words:

¹⁸² Cap 29 Laws of Ogun State of Nigeria. The provision is *in pari material* with Nigeria's Criminal Code Act.

¹⁸³ 2015 Legalpedia SC I9OR.

¹⁸⁴ Nigerian Courts have not ruled on the constitutionality or otherwise of caning as a form of punishment. However, this thesis has addressed punishment under the Constitution. Given current judicial attitudes, it is unlikely that courts would rule against it. They have in fact upheld it. Arguably, a legal challenge against hard labour will face up to the same constitutional problem.

This type of case should be an opportunity for sentencing authorities to really come out vehemently to show that society abhors the type of conduct exhibited by the appellant on this innocent young girl of five (5) years. Imagine the trauma (both physical and mental) the young girl was subjected to as a result of the insatiable urge of the appellant for mischief which he has invoked from the pit of hell. Violating a girl of just five years by the appellant in the manner he did is condemnable, barbaric, immoral and devoid of any reasoning whatsoever. I wish I have the power to increase his punishment. I could have done it in order to serve as deterrence to would-be rapists.

In Muntaka-Coomasie JSC's supporting opinion, he may well have sentenced the defendant to life imprisonment. In *Idris Rabi v The State*¹⁸⁵ also, the Court of Appeal observed that child rape had become awfully prevalent in the jurisdiction in which the offences were being tried. The accused persons, who were first offenders, were being tried for raping an 11-year-old girl. Describing their act as callous, the court affirmed the need to protect children and women by punishing sexual predators severely.

These judicial pronouncements are pretty strong acknowledgments of the problems that rape is becoming in the Nigerian society. Various reports confirm an upsurge of child rape in Nigeria.¹⁸⁶ However, the appellate courts need to do more than refrain from interfering with a trial court's sentencing discretion. In the absence of appropriate policy responses from the state, the Supreme Court especially needs to take the initiative to issue directives (sentencing guidelines) that lower courts can follow.

Indeed, a survey of sentencing decisions for rape crimes reveals quite a perturbing array of problems. For one thing, and as this thesis has consistently maintained, sentencers' decisions are terribly pithy when it comes to ratiocinating the objectives, principles and factors that should influence sentence. In the *Posu* and *Adonike* cases, it was obvious that the Supreme Court had little insight into how the trial court determined sentence, because no reasons were offered by that court. Had reasons been offered, one would have expected the Supreme Court to comment thereon, to evaluate whether the courts had exercised discretion judiciously or otherwise, even if

¹⁸⁵ 2004 Legalpedia CA XDO9.

¹⁸⁶ Bertram Mwannekanma 'Stakeholders proffer solutions to the rising cases of rape in Nigeria' July 31 2015, available at <http://www.ngrguardiannews.com/2015/07/stakeholders-proffer-solutions-to-rising-cases-of-rape-in-nigeria/>, accessed August 27 2015; Chineze J Onyejekwe 'Nigeria: The dominance of rape' (2008) Vol. 10 Issue 1 *Journal of International Women's Studies* 48-63; Amnesty International 'Nigeria: Rape – the silent weapon' (2006) available at <https://www.amnesty.org/en/documents/AFR44/020/2006/en/>, accessed August 27 2015.

no appeal against sentence had been placed before it. Secondly, one also finds inconsistencies in the sentences that courts have imposed. Sentencing for rape crimes in which children are the victims illustrates the problem. In *Habibu Musa v The State*¹⁸⁷ for example, a sentence of 14 years in prison was upheld by the Supreme Court. The victim in this case was a five-year-old girl. In *Edwin Ezeigbo v the State*,¹⁸⁸ the appellant was sentenced to two years imprisonment and a ₦500 fine, and a further three months imprisonment if he failed to pay the fine, for repeatedly raping an eight year old girl. A stiffer sentence of seven years imprisonment was imposed in *Oludotun Ogunbayo v The State*,¹⁸⁹ where the victim was a 13 year old girl, whom the defendant sexually and physically assaulted. In *The State v Hassan Audu*,¹⁹⁰ the defendant was sentenced to three years imprisonment for raping a nine-year-old girl, while the court in *Hassan Ibrahim v The State*,¹⁹¹ substituted a sentence of fine for a ten years sentence of imprisonment. The victim in the case, was a five-year-old girl.

The disparities revealed in the above cases and the lack of attention to ratiocinating punishment that is evident in the cases ought not to be allowed to persist. It is important that Nigeria's appellate courts have taken judicial notice of the pervasiveness of rape, the inadequacy of sentences imposed therefor and the need for a policy response. However, the courts can do much more than beckon on penal policy makers. When resolving cases, they can develop and harmonise a set of sentencing principles for specific crimes and offer these as guidelines for trial courts. Just how this can be achieved is discussed in chapter six.

5.8 Conclusion

This chapter has endeavoured to show that judicial engagements with sentencing in South Africa illustrate a continual process of developing and applying sentencing principles to individual

¹⁸⁷ 2013 Legalpedia PC P8MD.

¹⁸⁸ (2012) 6 NILR 12; two counts of rape were brought against the defendant, involving two child victims, but only one count of rape was proved.

¹⁸⁹ (2007) 4 NILR 203.

¹⁹⁰ [1972] 6 S.C. 18; the trial court in this case suspended the sentence for three house. On appeal however, the Supreme Court held that there is no legal backing for suspended sentences. It ordered the commencement of the sentence.

¹⁹¹ 2014 Legalpedia CA 1WAO.

cases. However, besides anchoring the constitutional validity of s 51, judicial applications of the provision has not met the desired objectives. Interpreting and applying ‘substantial and compelling circumstances’ under the provision has been controversial. Section 51 did not automatically instigate the desired change.¹⁹² Judges dug in, asserting as before, their traditional aversion to legislative interferences with judicial discretion. Although *Malgas* established a standard determinative test that cleared uncertainties surrounding the meaning of ‘substantial and compelling circumstances’, subsequent decisions that purported to apply, refine and particularize the test created judge-made rules that minimised objectivity in sentencing. One of the consequences of this has been conflicting sentences by different courts in similar situations, using the same set of principles, as illustrated by cases like *Ferreira* and *Nkomo*.

Of course, differences are to be expected in a discretion-driven system that idealises individualising punishment. Thus, even though two cases may have similar facts, their penalties may not necessarily be alike. There is always that probability that two judges weighing the issues will come to different conclusions about sentence. This makes comparing cases difficult. Even when there are important factual coincidences between two or more cases, they are often offset by differences that cannot be ignored for sentencing purposes.¹⁹³ Therefore, dissimilarities in sentences are inevitable.¹⁹⁴ However, problems emerge when the differences are so divergent as to portray significant sentence disproportionalities, or suggest a wonted judicial approach to sentencing that undermines the legislative purpose of a penal statute. Wide disproportionalities diminish certainty and predictability, which are important elements in the administration of criminal justice. In the South African experience, it has thwarted legitimate societal expectations that rape, as a genre of violent crimes, will be treated with deserving severity.

¹⁹² O’Sullivan and Murray op cit.

¹⁹³ See *S v G* supra note 111 at 300C-D.

¹⁹⁴ The wisdom of allowing such differences pervades the principle that an appellate court ought not to interfere with the sentencing discretion of the trial court on the basis alone that it would have imposed a different sentence had it been the trial court. An appellate court may only substitute its discretion for that of the trial court if the latter imposed a sentence that is ‘shocking’, ‘alarming’ or ‘startlingly disproportionate’. Even then, giving ‘practical content’ to the epithets can be difficult, because they require resolving quantitative (that is, the amount of punishment) or qualitative (involving whether for instances, the court should impose a prison sentence, fine, or community service) differences in what the trial and appellate courts may consider to be appropriate sentence. When weighing whether to intervene therefore, the court must be restrained by the fact that differences in judicial opinion will exist. This makes arriving at an appropriate sentence one of the more difficult tasks that could confront a court. See *S v Rabie* supra note 10, at 865A-B,

South Africa's sentencing problems expose deeper problems in penal policy, which rape illustrates. The deviation from the legislative purpose of s 51 that is apparent in judicial decisions conveys the absence of agreement on key policy issues regarding how to respond to the social pandemic that rape is. The policy quagmire is not because there have not been legislative and judicial activity around the issue. This chapter explored the measures that have been taken to address the problem. Rather, it seems to be the case that the legislature – and the public, if one considers that legislatures exercise popular mandates – and courts are at variance regarding the penal values to attach to rape. The courts in particular have come under serious criticisms for 'retreat[ing] from the initial purposes of the minimum sentencing legislation' and for 'overusing' and interpreting the 'substantial and compelling circumstances' provision in a way that undermines the legislation and women's rights.¹⁹⁵ The lack of agreement is also evident in the court's resistance to s 51(3)(a)(aA)'s list of factors that should not be regarded as 'substantial and compelling circumstances'.

However, the blame does not all belong to the courts. As suggested in this chapter, courts are right to exercise caution around penal statutes that do not provide gradations in punishment, as s 51 of Act 105 fails to do. Also, sentencing discretion, when exercised without the aid of definitive guidelines for instance,¹⁹⁶ is prone to produce controversial outcomes. As such, even if sentencers were to review their approach to sentencing, much more would still be required to enhance consistency. That would mean that even if Nigerian courts were to borrow examples from how their South African counterparts have developed jurisprudence around how constitutional principles should moderate punishment, they would still come against the challenge of determining how these and other principles translate to sentencing tariffs. Fortunately, South Africa's Supreme Court of Appeal has hinted at the desirability of sentencing guidelines that are modelled after the sentencing guidelines adopted by the United Kingdom.¹⁹⁷ The next chapter examines how those guidelines have been utilised to introduce consistency to sentencing in the United Kingdom, and why this type of model will be beneficial to Nigeria.

¹⁹⁵ Western Cape Consortium on Violence against Women op cit note 28 at 6.

¹⁹⁶ See discussion in chapter 6 section 2.3.4.

¹⁹⁷ *S v Vilakazi* supra note 63 at 558 paras B-C.

Before a sentencing guideline is adopted however, a legislative review of s 51 may be necessary to resolve the absence of gradation between the sentences provided in the section. This is necessary if public confidence in the sentencing process is to be reclaimed. That said, whether the review should retain mitigating elements that have been imported into s 51 by courts, how or the extent to which this ought to be done and how penal severity for crimes that are covered by s 51 ought to be measured are questions that have to be determined within the social context of crime in South Africa. These are questions that should be resolved through empirical surveys.

Another reason for a legislative review, which also applies to Nigeria to some extent, boils down to the fact that the current system exacts an unacceptable toll on judicial resources. It is common knowledge that appeals against sentence may take years to conclude, increase the court's workload and the costs of litigation,¹⁹⁸ which in turn may impede poor offenders from exploring their fair trial rights to the full. Even if it is argued that the appellate process reduces sentencing discrepancies and the propensity for disproportionate sentences, it would not justify the toll on judicial resources. The toll and delays in the current process can be significantly reduced if sentencing guidelines are put in place.

¹⁹⁸ On this point, see William T Pizzi *Trials Without Truth: Why Our System of Criminal Trial Has Become an Expensive Failure and What We Need to do to Rebuild It* (1999) 178.

Chapter 6 Structuring Discretion: Key Principles for a Model Sentencing Guideline

6.1 Introduction

The preceding two chapters illustrated how the absence of a system of guidelines that rationalizes judicial discretion impedes the achievement of proportionality and consistently fair sentences. Thus, how sentencing can be rationalised to achieve consistency and proportionality becomes the next focus of this thesis. This chapter seeks to identify and explain those essential features of a sentencing guideline that may contribute towards achieving consistency and proportionality. However, a caveat is needful; the goal is not to find a perfect model for structuring sentencing discretion. However detailed a guideline may be, selecting punishment still requires a measure of intuition that allows the individual sentencer's own perception of the seriousness of the case at hand.¹ Without a guideline, several sentencers, separately bringing their instincts to bear on the facts of the same case, are likely to pronounce dissimilar sentences. The aim of a guideline is to create a rational framework within which that instinctive process can occur, so as to reduce margins of differences to a necessary minimum. Thus, it may be said that no guideline should seek to completely eliminate differences in sentences. Some degree of difference is also necessary to accommodate the individualisation of punishment. The aim of this chapter therefore, is to find that model that enables the exercise of discretion within a structured scheme that can be rationally defended.

The challenge of achieving proportionate and consistently fair sentences also raises questions about the fairness of the sentencing process. For the present purpose, a fair sentencing process connotes a rational system that strives towards ensuring that offenders get no more and no less than the punishment that they deserve. Evidently, the subject of 'deservedness' prompts serious moral and philosophical challenges regarding quantitative measures of punishments, which have proven hard to resolve. The precise difficulties surrounding this was considered in

¹ *R v Williscroft* [1975] VicRp 27.

chapter two and need not be revisited in this chapter. The aim of this chapter is essentially practical, and it is to identify those principles that are essential to a rational sentencing scheme for Nigeria, which would be conducive to fair sentencing and minimise inconsistencies. The chapter charts the path to this goal by looking at some of the critical developments that shaped the sentencing guidelines discussed below.

6.2 Two Model Guideline Systems: Contrasting the Strengths

Jurisdictions across the world adopt different approaches to structuring sentencing discretion, ranging from mandatory minimum sentences to determinate sentences, numerical guidelines, or even appellate review.² Of these, two models, namely the Minnesota Sentencing Guideline and the model for England and Wales will be examined. The two offer the most developed guideline systems available.³

6.2.1 **The Minnesota Sentencing Guideline**

By the 1970s in the United States of America (USA) the ideal of rehabilitation that underlined the practice of indeterminate sentencing had become seriously discredited.⁴ Indeterminate sentencing gave courts unfettered discretion, which undermined the imperative for consistency and predictability in sentencing. According to Stuart and Sykora, an example of the scope of discretion that courts wielded can be found in sentencing for robbery, where an offender who

² Andrew Ashworth 'Four techniques for reducing sentence disparity' in Andrew von Hirsch and Andrew Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* 2 ed (1998) 227-239; Andrew Ashworth 'Structuring sentencing discretion' in Andrew von Hirsch & Andrew Ashworth *Principled Sentencing: Readings on Theory and Practice* 2 ed (1998) 212-218.

³ Andrew Ashworth and Julian V Roberts 'Origins and nature of the sentencing guidelines of England and Wales' in Andrew Ashworth and Julian V Roberts *Sentencing Guidelines: Exploring the English Model* (2013) 1-11 at 1-2. Other jurisdictions like Canada, New Zealand and Australia follow different systems ranging from appellate review to legislation that sets out general guiding principles and factors that courts should consider, or prescribe sentencing laws. See Gary Trotter 'Appellate review of sentencing decisions' in Julian V Roberts & David P. Cole *Making Sense of Sentencing* (1999) 230-241; Gareth Griffith 'Sentencing guidelines and judicial discretion: A review of the current debate' (1994) *Briefing Note* No 015/94 New South Wales Parliamentary Library, available at [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/ResearchBf1521994/\\$File/SENTENCINGGUIDELINES.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/ResearchBf1521994/$File/SENTENCINGGUIDELINES.pdf), accessed 13 April 2014.

⁴ See Marvin Zalman 'The rise and fall of the indeterminate sentence' (1977-1988) 24 *Wayne L. Rev* 45-80.

receives an indeterminate custodial sentence of between ‘0-20 years’, could see his prison time reduced to three years because the Corrections Board returned a favourable review of his conduct.⁵ Such incongruous outcomes in the USA spurred the quest to rationalise discretion, improve consistency and find a suitable alternative to rehabilitative sentences.

The first state-wide reforms in USA were in the State of Minnesota, which in 1978 adopted legislation⁶ that established a specialized autonomous administrative agency called the Sentencing Guideline Commission, which was vested with responsibilities for developing guidelines. Besides wanting to reverse the very discretionary trend that sentencing in the state had assumed, the idea of vesting an autonomous agency with responsibility for developing guidelines also aimed to insulate the formulation of sentencing policy from volatile political pressures that elected officials brought to bear on policymaking.⁷

The Commission’s task involved developing guidelines that determine situations for which custodial sentences would be appropriate, and recommending presumptive sentences for crimes for which prison sentences are necessary.⁸ This clearly showed that the underlying rationale did not support custodial sentences for all crimes. Presumptive sentences were preferred in the belief that it would introduce a measure of predictability that was missing in rehabilitation-based sentencing. Henceforth, sentencing was to be based on proportionality, or a scale of presumptive sentences that match sentence severity with offence seriousness and the degree of blameworthiness. The sentences were also to be developed with proper regard for the need to reduce inconsistencies and maintain prison populations within the capacity of available correctional resources within the state.⁹

To develop guidelines that met these requirements, the Commission researched judicial sentencing and early prison release practices to determine the actual duration that offenders spent

⁵ See John Stuart & Robert Sykora ‘Minnesota’s failed experience with sentencing guidelines and the future of evidence-based sentencing’ (2011) Vol. 37:2 *William Mitchell Law Review* 426-468.

⁶ Minnesota Laws 1978 ch. 723.

⁷ Stuart & Sykora op cit note 5 at 428; the discussion below on UK sentencing model explores this concern about political influences on sentencing policy in a little more detail.

⁸ Minnesota Laws 1978 ch 723 sec 9 subd 5.

⁹ Minnesota Sentencing Guidelines Commission ‘Report to the Legislature’ January 1 1980 1, available at <http://mn.gov/sentencing-guidelines/images/1980%2520Legislative%2520Report.pdf>, accessed 27 December 2013.

in custody.¹⁰ Its findings provided the data for putting the Minnesota Sentencing Guidelines together. The guidelines, which came into force on May 1 1980 made the severity of the crime (i.e., actual or risked harm) and the criminal history of the offender the decisive factors in fixing sentences.¹¹ The retention of these two elements expressed the underlying principle of the guideline system, which will be discussed further shortly. But first, a description of the guideline is necessary.

6.2.1.1 *The Structure of the Minnesota Guidelines*

The standard guide¹² is a two-dimensional grid that attaches numerical values to the seriousness of an offence and the criminal history of the offender. The dimensions are represented on vertical and horizontal axes that intersect to form cells that contain a range of numbers that represent a predetermined number of months. These numbers convey the length of sentence that is presumed to be appropriate for each category of crime. The vertical axis categorizes offences into eleven severity levels,¹³ while the horizontal axis represents the offender's criminal history score, also represented in seven levels, starting with '0', representing absence of criminal history and ending with '6 or more' previous convictions.¹⁴

With each cell therefore, the 'severity level of the offence' and the offender's criminal history tally into a 'presumptive fixed sentence' that is represented in months. The cells also contain a range of months that provide the scope of 'permissible deviation'. The range ensures

¹⁰ Ibid at 1-2.

¹¹ Ibid at 5; another important factor the Commission identified was whether or not the offender was on parole or probation at the time he committed the current offence.

¹² Ibid at 38. A single guideline was first adopted in 1980. Subsequently, due to significant concerns that sex offences were not being dealt with the level of penal severity they deserved, a separate guideline began to be used for sexual offences. See Debra Dailey 'Minnesota's sentencing guidelines – 1995 update' in Michael Tonry & Kathleen Hatlestad (eds) *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (1997) 45-49; see also Richard Frase 'Prison population growing under Minnesota Guidelines' in Michael Tonry & Kathleen Hatlestad (eds) *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (1997) 40-45.

¹³ The 1980 sentencing grid had ten categories of severity levels, but this changed to eleven in 2002. It has remained eleven since then. See Appendix B for the current grid. See also Minnesota Sentencing Guidelines Commission 'Minnesota sentencing guidelines and commentary' Revised August 1 2002 available at <http://mn.gov/sentencing-guidelines/images/2002%2520Guidelines.pdf>, accessed 29 December 2013.

¹⁴ Minnesota Sentencing Guidelines Commission 'About the guidelines' <http://mn.gov/sentencing-guidelines/guidelines/about/>, accessed 23 December 2013; see also SS Terblanche 'Rape sentencing with the aid of sentencing guidelines' XXXIX (2006) CILSA 1-38 at 4-5.

that sentencers retain discretion, and can depart from presumptive sentences.¹⁵ At the same time however, it narrows down the range of discretion in order to reduce sentencing inconsistencies.¹⁶ The current 2013 standard grid (see Appendix B) contains a shaded area that suggests when a prison sentence may not be appropriate. Offences that fall within the area would ordinarily be subjected to a stayed sentence (or stayed execution of sentence). A decision to stay sentence may also adopt intermediate or other non-incarcerative sanctions, meaning the court may opt to impose a probation order, a fine, restitution, community service or rehabilitative treatment, etc.¹⁷ For offences that come within the non-shaded areas, prison sentences are presumed to be appropriate, and the threshold for imprisonment decreases as the gravity of the crime increases¹⁸ For crimes like aggravated murder, first degree assault, murder, and second or third degree murder, imprisonment is recommended for first offenders. First degree murder attracts a mandatory life sentence and is excluded from the application of the guideline.¹⁹

6.2.1.2 *The Overarching Rationale of the Minnesota Guideline*

Some notable things stand out in the grid system. As mentioned above, the grid's focus on offence severity and criminal history as the basic criteria for formulating proportionate sentences gives a strong deserts basis to the guideline system.²⁰ The selection of these basic criteria was the outcome of the Commission's research findings, which indicated that offense severity and

¹⁵ Debra Dailey 'Minnesota's sentencing guidelines – past and future' in Michael Tonry & Kathleen Hatlestad (eds) *Sentencing Reform in Overcrowded Times: A Comparative Perspective* 35-40 at 36.

¹⁶ Minnesota Sentencing Guideline Commission op cit note 9 at 12.

¹⁷ Intermediate sanctions have been described as those range of punishments that are less severe than imprisonment, but more burdensome than probation. See Dailey 'Minnesota's Sentencing Guidelines – Past and Future' op cit note 15; for a detailed discussion on intermediate sentences, see David Levinson, *Encyclopedia of Crime and Punishment* California (2002) 594-595 & 916; see also Michael Tonry 'Intermediate sanctions in sentencing guidelines' (1998) Vol. 23 *Crime and Justice* 199-253.

¹⁸ Criminal history index score calculated by awarding a point for each felony conviction that occurred before the current sentencing. A point is assigned where the offender is on probation, parole, or imprisoned following a felony or gross misdemeanor conviction, or where he or she is released pending conviction when the current offence was committed. One or two points may be assigned respectively for each misdemeanor conviction and for each gross misdemeanor conviction incurred before the current sentencing, if certain conditions are met, such as where the misdemeanor or gross misdemeanor convictions are for statutory offences, and where multiple sentences are imposed for a single course of conduct. However, no more than two points shall be imposed for prior multiple sentences that arose from a single course of conduct involving multiple victims. See Minnesota Sentencing Guidelines Commission op cit note 9 at 27-29.

¹⁹ It is excluded by virtue of Minn. Stat. § 609.185.

²⁰ Ashworth 'Four techniques for reducing sentence disparity' op cit note 2 at 232.

criminal history constituted the most relevant considerations in past sentencing dispositions and in parole practices in the state. But the research also found that other theories of punishment were present in judicial sentencing. For instance, the Commission found that ‘dispositional lines emphasised (a) just deserts, (b) incapacitation and (c) various degrees of emphasis between the two’.²¹ Dispositional lines are gradients that are drawn with the help of sentencing patterns. They are used to indicate the rationale that a particular sentence should emphasise, when a court would impose one dispositive measure or the other, and how long the sentence ought to be. A line with a flatter slope emphasises the seriousness of the current conviction, as the primary sentencing factor, and is thus considered to be just deserts oriented. A steep line makes the offender’s criminal record a weighty sentencing factor and reflects an incapacitative rationale.²² The Commission weighed the comparative benefits between these levels of emphasis, and adopted the position that a modified just deserts approach was the way to go. Its decision was influenced by the impact that emphasis on either theories or on the offence, over and above criminal record, would have on prison population and resources.²³

This modified approach was incorporated in the grid with the overarching objective of establishing a rational standard that minimizes sentence disparities and ensures that sentences are proportionate to the offence and the criminal history of the offender.²⁴ Thus, just deserts²⁵ became the ‘primary sentencing principle’, but also imbedded in the grid was an important

²¹ Minnesota Sentencing Guideline Commission op cit note 9 at 9.

²² Andrew von Hirsch ‘Structure and Rationale: Minnesota’s Critical Choices’ in Andrew von Hirsch; Michael H. Tonry and Kay A Knapp *The Sentencing Commission and its Guidelines* (1984) Press, 84-106 at 84-94; Blumstein; Cohen & Martin et al *Research on Sentencing: The Search for Reform, Volume 2* (1983) 279-280.

²³ See Minnesota Sentencing Guideline Commission op cit note 9 at 6-10. The Commission considered the theories of punishment that became apparent in its review of sentencing practices. In its words on page 9 of the report, “in terms of philosophies of punishment, the Commission considered dispositional lines which emphasized (a) just deserts, (b) incapacitation, and (c) various degrees of emphasis between the two. A just deserts dispositional line would have a very flat slope, and the offence of conviction would be the dominant factor in deciding who should be imprisoned. Our assessment of system impact indicated that a line which heavily emphasized just deserts would be incompatible with available correctional resources. An incapacitation dispositional line would have a very steep slope, emphasizing criminal history much more than offence of conviction. Between these two extremes, the Commission considered a number of options where the slope of line varied less drastically, but gave greater emphasis to one goal or the other.”

²⁴ Ibid at 13, 26; the guidelines goal of achieving proportionate punishments encapsulates the principle of equity, which requires that felons who are convicted of committing similar offences in similar circumstances receive similar punishment. Conversely, convicts whose crimes are ‘substantially different from [the] typical case’ receive different punishment.

²⁵ See discussion on the modified theory of deserts in chapter 2 section 6 above.

utilitarian slant. It favoured prison sentences for violent crimes, but also allowed mitigating circumstances to justify departure from the presumptive sentence.²⁶ The choice of just deserts as the primary underlying principle was predicated on the view that the principle was more likely to further the objectives of achieving sentencing consistency and proportionality. However, imbedding a utilitarian slant in the guideline ensured that even when deserts ‘define[d] the maximum sentence severity in almost all cases’ and prescribed flexible minimum sentences for most serious cases in particular, it demanded no minimum sentences for most other offences.²⁷ This approach ensured that judges retained sentencing discretion and, more importantly, imposed prison sentences only for serious sentences, or where the criminal history, in correlation with the severity of the offence, made a prison sentence imperative. In deciding sentences, the seriousness of harm clearly received priority over criminal history.²⁸

The point has been made that the above approach expresses the principle of parsimony, a staple theme of utilitarian justifications of punishment.²⁹ It operates within the Minnesota guideline as a measure for facilitating the stated goal of keeping prison inmate levels within the capacity of prison and correctional resources. It therefore follows that unless the crime is of the prescribed level of seriousness or the offender has a serious criminal history, the court is likely to impose a stayed sentence. A stayed sentence allows the offender to be placed on probation, community service, rehabilitation or house arrest.³⁰ This arrangement illustrates the clearly utilitarian dimension to the grid system, which besides seeking parsimony, also aims to incapacitate serious or habitual offenders by incarcerating them. The severity of sentence and the probability that a prison sentence will be imposed increases in direct proportion to offence gravity and the offender’s criminal history.³¹

²⁶ Minnesota Sentencing Guideline Commission op cit note 9 at 9-10; in the 1980 grid, there is a presumption against imprisonment for severity level one offences. See page 11 of Report.

²⁷ Richard S Frase ‘Limiting retributivism’ in Michael Tonry (ed) *The Future of Imprisonment* (2004) 83-120 at 98; at the time, about one-quarter of Minnesota’s annual caseload comprised of serious offences.

²⁸ Ashworth ‘Four techniques for reducing sentence disparity’ op cit note 2 at 232.

²⁹ Frase (2004) op cit note 27 at 94-95.

³⁰ Minnesota Sentencing Guideline Commission ‘About the guideline’ at <http://mn.gov/sentencing-guidelines/guidelines/about/>; see also Minnesota Sentencing Guidelines Commission op cit note 9 at 26.

³¹ Minnesota Sentencing Guidelines Commission op cit note 9 at 26.

One of the outcomes of the scheme was that there were more prison sentences for assault crimes and fewer for property crimes.³² Property crimes, which were generally regarded as less serious than violent crimes, were ordinarily dealt with by stayed sentences. On the whole, the design of the system ensured that Minnesota's overall sentence levels, the intersections between the vertical and horizontal axis on the grid, and the place given to suspended sentences operated at such levels of efficiency that kept prison population within the capacity of the State's correctional resources.³³

6.2.1.3 *Individualizing Sentence under the Grid System*

Minnesota's presumptive sentences were set in the grid on the basis of what the Commission considered to be typical crimes, or crimes that are committed in typical circumstances. Where the circumstances of the crime are atypical, such as where it is committed with unusual brutality or with less ferocity than is typical, the guideline system permits the imposition of a sentence that is higher or lower than the presumed sentence. The test for departure is that the crime must involve substantial and compelling circumstances which would make the imposition of the presumed sentence unfair,³⁴ and the sentencing judge must put his or her reasons for departure in writing.³⁵ On one hand, the substantial and compelling circumstances clause underlines the advisory nature of the guideline, as it recognizes that the presumed sentence may not be applied for valid reasons.³⁶ On the other hand however, the clause also serves as a control measure on the exercise of discretion. The requirement that the reasons for departure must be stated in writing conveys the point that the presumptive sentences may not be lightly departed from, and that departures may be subject to appellate review.

As already pointed out, the guideline seeks the overarching aim of establishing a rational and consistent sentencing standard that ensures a proportionate balance between offence severity and criminal history. Sentencers must take this aim into account with a view to achieving what

³² Ibid at 15.

³³ Ashworth 'Four techniques for reducing sentence disparity' op cit note 2 at 232.

³⁴ Minnesota Sentencing Guideline Commission op cit note 9 at 30-32.

³⁵ Ibid at 9-10.

³⁶ Ibid at 26.

the Commission describes as equity in sentence. Equity is a principle that entails similar treatment for similar cases and the treatment of substantially atypical crimes with sentences that appropriately reflect that difference.³⁷ The determination of the appropriate sentence in individual cases is enhanced by a set of aggravating and mitigating factors that are intended to further rationalize sentencing discretion. These factors incorporate the underlying principle that race, sex, employment³⁸ and social factors³⁹ shall be neutral values in sentencing. Hence, a court may not impose a stiffer or lighter sentence on the basis of any one of these values, or consider any one of them as justifying departure from the presumptive sentence.⁴⁰

The fact that the victim was the aggressor, or that the offender played an insignificant role in the commission of the crime, or that he was coerced into participation, may be mitigating. Where the ‘offender lacked substantial capacity for judgment when the offence was committed’, due to some ‘physical or mental impairment’, the court shall consider sentence mitigation. However, where diminished capacity is caused by voluntary consumption of drugs or alcohol, it shall not be a mitigating factor.⁴¹ The list is not exhaustive and ‘other substantial grounds that excuse or mitigate the offender’s culpability may also apply.’⁴² On the other hand, factors that may aggravate sentence and justify departure include where the victim had a vulnerability of which the offender was aware,⁴³ where the offender was particularly cruel to the victim, or where the offence is a serious economic crime that involves two or more aggravating features.⁴⁴ The fact that the victim was injured in the current offence and that the offender had a previous felony conviction for an offence in which the victim was also injured may also aggravate sentence.⁴⁵

³⁷ Ibid.

³⁸ Ibid at 30; this factor excludes consideration of the impact that sentence would have on profession or occupation of the offender, the offender’s employment history, whether he was employed at the time of committing the offence or at the time of sentencing.

³⁹ Social factors include ‘educational attainment’, ‘living arrangements at the time of offence or sentencing’, ‘length of residence’, and ‘marital status’. The list also excludes ‘the exercise of constitutional rights by the defendant during the adjudication process’. See Minnesota Sentencing Guideline Commission op cit note 9 at 30-31.

⁴⁰ Ibid at 26, 30-31.

⁴¹ Ibid at 31.

⁴² Ibid.

⁴³ Ibid; vulnerability may be due to age, infirmity or reduced physical or mental capacity.

⁴⁴ Other aggravating features include abusing a position of trust to perpetrate the offence and where the offence involved actual or threatened financial loss that was substantially greater than the usual offence.

⁴⁵ Minnesota Sentencing Guideline Commission op cit note 9 at 31.

6.2.1.4 *The Successes and Demerits of the Minnesota Guidelines*

The Minnesota guideline system was successful in reducing sentencing disparities and achieving parsimony. It de-emphasized imprisonment for property offenders, increased the use of prison sentences for violent offenders and tied sentencing policies to available prison resources. As a result, Minnesota's incarceration rates dropped to record lows⁴⁶ and the Minnesota State Supreme Court was able to develop a 'jurisprudence of permissible and impermissible departures'.⁴⁷ Sentencing consistency increased by about 50 percent in the 1980s. The more violent offenders went to prison and the less violent were kept out.⁴⁸ The scheme kept prison population within capacity of the State's correctional resources in the early 1980s.⁴⁹

The Minnesota guideline system received widespread acceptance in America. Shortly after it was adopted, a host of other states in the USA adopted similar guidelines. Even the US Congress passed the Sentencing Reform Act of 1984, which established the United States Sentencing Commission and gave it the responsibility of developing a federal grid-based guideline.⁵⁰ An important element in the success of the Minnesota guideline lay in the fact that it introduced a primary rationale for sentencing – just deserts. Even though it was a modified principle, it was nevertheless the crucial factor, as it agreed with public sentiments that widely rejected rehabilitation-based sentencing on one hand and favoured proportionate sentencing on the other. By endorsing a primary rationale, the guideline was probably spared the glitches that the implementation of the federal guideline experienced. According to Ashworth, those glitches arose because the federal Sentencing Reform Act of 1984 failed to affirm a primary rationale for sentencing. Instead, the guideline adopted an 'indiscriminate mixture of rationales' that caused fundamental problems for judges who, without the assistance of a primary 'guiding aim', had to

⁴⁶ Debra Dailey 'Minnesota's sentencing guidelines – past and future' op cit note 15 at 35. The author wrote also that racial differences in sentencing patterns lessened.

⁴⁷ Ashworth 'Four techniques for reducing sentence disparity' op cit note 2 at 232.

⁴⁸ Debra Dailey 'Minnesota's sentencing guidelines – past and future' op cit note 15 at 36.

⁴⁹ Frase (1997) op cit note 12 at 41; Susan Easton and Christine Piper *Sentencing and Punishment: The Quest for Justice* (2012) 99.

⁵⁰ Ashworth 'Four techniques for reducing sentence disparity' op cit note 2 at 232. About 20 US states created sentencing commissions. Of these, guidelines recorded successes in Pennsylvania, Oregon and Washington, while commissions in six other states worked.

decide which factors should mitigate or aggravate sentence. It rendered the guideline's goal of achieving consistency 'a forlorn hope'.⁵¹

However, it was not all smooth sailing for the Minnesota guideline. Its categorization of crimes into ten and subsequently eleven levels of seriousness was rather rudimentary and gave sentencers and prosecutors a discretionary range that allowed them to skirt the guidelines.⁵² The guideline also did not provide standards for the use of non-prison sentences as it did for prison sentences. As a result, inconsistencies and disproportionalities emerged in the use of non-prison sentences in the state, while also provoking a spike in the use of custodial measures. Imprisonment came to be seen widely 'as the only legitimate means of punishment and control'.⁵³

There have been challenges that are external to the guideline. For example, the guideline was unable to hold up under a changing political climate that favoured tougher sentences. From the late 1980s into the 1990s the number of convictions for repeat offenders, violent offenders, drug offenders and sexual offenders increased, resulting in more prison sentences.⁵⁴ The rates at which probation orders and parole were revoked also increased. In response to growing public quest for tougher sentences, the Minnesota Legislature and the Commission increased the severity of sentences.⁵⁵ The state also established a task force on sexual violence, which called for significant increase in rape sentences and mandatory maximum terms for repeat rape

⁵¹ Ibid at 233.

⁵² Ibid at 232; to be able to sentence, judges would have to fit the crime into the categories offered by the grid. It is hardly feasible that all crimes could quite simply be classified into so few a number of categories. Not surprisingly perhaps, there are 43 offence levels in the US Sentencing Guidelines. See United States Sentencing Commission *Guidelines Manual* September 2013 395; available at http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/2013_Guidelines_Manual_Full_Optimized.pdf, accessed 5 February 2014.

⁵³ Dailey op cit note 15 at 39; the author also wrote that the omission resulted in 'a widening of the net in the use of intermediate sanctions'. She notes however that there was widespread opposition to the development of state-wide standards for non-custodial sanctions. The reasons were that it was thought that a state-wide policy would be difficult to manage effectively, since implementation would have to depend on locally funded correctional resources. It was also believed that developing an additional guideline for such sanctions would result in a complex sentencing system. The author concluded nevertheless that increasing emphasis on the use of community corrections increases the need for standards for intermediate sanctions.

⁵⁴ See Dailey op cit note 15 at 36-39.

⁵⁵ Ibid at 35-36; see also Frase (1997) op cit note 12 at 41.

offenders. These interventions resulted in a growing prison population.⁵⁶ Despite the increases, however, prison population managed to stay well within prison capacity, meaning the guideline succeeded in checking prison population growth, at least during its early years of coming into operation.⁵⁷

With the passage of time, the problems of implementing the sentencing guideline system became bigger. A 2011 publication by Stuart and Sykora⁵⁸ reported on the implementation of the Minnesota sentencing guideline system over a thirty year period and came to the conclusion that the promise that the guideline system held remained unfulfilled. The authors attributed the failure to repeated legislative interventions in sentencing policy, which eventually eroded the deserts rationale that underlay the guideline. These interventions ran afoul of the political rationale behind establishing an independent administrative agency to develop sentencing guidelines in the first place. Indeed, the interventions conveyed a different political rationality that favoured incapacitative sentences for serious offenders, especially those convicted of violent, sexual and drug related crimes. Legislation that prescribed stiffer sentences passed and because these sentencing prescriptions ignored the principle of proportionality, judges and lawyers who felt that the penal prescriptions were too harsh sought ways to skirt them. This caused sentencing disproportionalities and disparities to thrive again, and the original intention of reserving prison sentences for violent offenders to fail. The goal of achieving parsimony did not survive political interventions either.⁵⁹

Pertinently, the study noted that the guideline could have worked well but for political or legislative interventions. Even then, it could still play a useful role if sentencing practice returned to the primary aim of achieving proportionality and economy in sentencing. Political interventions stifled the Commission, relegating it to a rather insignificant role in developing sentencing policy. Thus, the initial goal of insulating sentencing policy from political pressure floundered and the objective of keeping the size of prison population under control became

⁵⁶ Stuart & Sykora *op cit* note 5 at 432-433.

⁵⁷ Frase (1997) *op cit* note 12 at 43-44; The legislature also introduced measures to reverse the rise in prison population, such as a 1990 crime bill that created an 'intensive community supervision' programme for offenders in prison or those who faced the revocation of probation.

⁵⁸ Stuart & Sykora *op cit* note 5 at 428.

⁵⁹ *Ibid* at 436-443, 467.

threatened by a fivefold growth in the size of inmate population occurring over the thirty-year period. In Minnesota, these developments – and the fact that questions about how to measure just deserts remained unanswered despite the guideline – prompted a new approach to sentencing.⁶⁰

6.1.2.5 *Evidence-Based Practice: ‘A New Frontier in Sentencing Policy and Practice’*

Within the context of the above challenges judges and practitioners began to utilize pre-sentence reports to set sentences. This development resulted in ‘evidence-based practice’ (EBP) in sentencing in Minnesota.⁶¹ EBP consists of a body of ‘empirically-derived practice guidelines [that are utilised to enhance] the quality of decision making’.⁶² However, no single definition describes EBP. It is perhaps more useful to define it in terms of its features. First, EBP uses scientifically generated knowledge to assess causes (risk factors) that increase the chances of reoffending. Conversely, it also assesses those factors that diminish risk factors. Furthermore, it enables the court to determine the offender’s criminogenic needs (i.e., traits that show clinical or functional impairment). Lastly, it facilitates the court’s ability to determine those characteristics of an offender for indications of the type of punishment that would be cost effective and most appropriate to reduce the risk that he will re-offend.⁶³ As a sentencing practice, EBP signals a commitment to use correctional resources to address the offender’s needs for rehabilitation.⁶⁴

EBP utilizes developments in the behavioural sciences, such as the ‘actuarial risk assessment tool’⁶⁵ to predict future criminality. Usually, its targets are offenders who pose the

⁶⁰ Ibid at 428-433. The questions included whether the deserts of a given offence should be probation, some intermediate sanction or a prison sentence, how proportionate gradations from one degree of seriousness to another should be determined and how sentences for one crime may be kept in comparative proportionality to sentences for other types of crime.

⁶¹ Richard E Redding ‘Evidence-based sentencing: The science of sentencing policy and practice’ (2009) Vol. 1 No. 1 *Chap. J Crim. Just.* 1-19 at 6-7.

⁶² Ibid at 2.

⁶³ Ibid at 2-4.

⁶⁴ See Kirk Heilbrun ‘Risk assessment in evidence-based sentencing: Context and promising uses’ (2009) Vol. 1 No. 1 *Chap. J Crim. Just.* 127-142 at 127-128.

⁶⁵ Ibid at 134. The ‘actuarial risk assessment tool’ uses statistical methods and the presence or absence of predetermined set of risk factors to estimate the probability of the risk of violence within a given period, or to draw conclusions on the risk levels of an offender. According to Heilbrun, the tool is “‘a formal method’ of prediction that “uses an equation, a formula, a graph, or an actuarial table to arrive at a probability, or expected value, of some outcome.” It uses empirical research to relate numerical predictor variables to numerical outcomes. The *sine qua non* of actuarial assessment involves an objective, mechanistic, reproducible combination of predictive factors,

most serious risk of reoffending. According to Stuart and Sykora,⁶⁶ it evaluates criminogenic needs not just to predict an offender's risks of reoffending, but also to determine what behavioural stimuli might motivate him to alter his behaviour.⁶⁷ It also helps the sentencer identify situations where deserts-based punishment 'unproductively increases ... cost, recidivism or both'.⁶⁸ This information enhances the court's capacity to select punishments that reduce recidivism and costs, seek evidence regarding these aims, be more involved in providing the offender with the tools that will facilitate his rehabilitation and be part of managing that process. From the post-sentence side of things, it allows parole boards to hinge their decisions on the risks posed by the offender, rather than on a deserts-based grid system.⁶⁹

More than two decades of rigorous research in Minnesota have recorded evidence of EBP successes in reducing recidivism and costs. A respectable number of offenders who were selected to participate in EBP rehabilitation programmes posted remarkable results of not reoffending.⁷⁰ But there are inherent problems in the practice, such as the propensity to base sentence on risk of reoffending rather than on offence severity. To avoid this risk, Stuart and Sykora recommend fusing EBP and determinate sentencing methods, so that 'the judge [can] use

selected and validated through empirical research, against known outcomes that have also been quantified'. See also Monahan, Steadman & Appelbaum et al 'Developing a clinically useful actuarial tool for assessing violence risk' (2000) 176 *BJPsych* 312-319; Fazel, Singh, Doll et al 'Use of risk assessment instruments to predict violence and antisocial behavior in 73 samples involving 24, 827 people: Systematic review and meta-analysis' (2012) *BMJ* 345, available at <http://www.bmj.com/content/345/bmj.e4692>, accessed 26 September 2014.

⁶⁶ Stuart & Sykora *op cit* note 5 at 447, 453 and 460-461; in 1997, Minnesota developed an evidence based tool called the Minnesota Sex Offender Screening Tool-Revised. The tool incorporates 16 'empirically verifiable items ... to predict sex offence recidivism'. It's incorporation of these items shows a departure from assessments that are based on the sentencer's intuitive appreciation of the risk factors. According to Stuart and Sykora, in EBP, the judge's ability to determine criminogenic needs is essential for sentencing efficiency. The needs are typically associated with 'behaviours, attitudes and values' that are most likely to predispose an offender to reoffend. The judge usually looks at determinants of behaviour such as 'low self-control, anti-social personality, antisocial values, criminal peers, substance abuse, and a dysfunctional family'.

⁶⁷ See Redding *op cit* note 61 at 3-4. A variant of actuarial method is 'structured professional judgment' (SPJ). SPJ 'analyses risk factors in a less formulaic way, allowing for limited clinical judgment as the needs of individual cases dictate'. According Heibrun *op cit* note 64 at 134, SPJ is flexible because the assessor can assess other factors beyond those specified, but not as precise as the actuarial method because the assessment does not have to assign a quantitative value to high and low risk factors.

⁶⁸ Stuart & Sykora *op cit* note 5 at 448.

⁶⁹ *Ibid* at 453, 458-459.

⁷⁰ *Ibid* at 447, 456-457.

her discretion to tailor sentences to address individual defendant's risk and needs while maintaining proportionality based upon seriousness of the offense'.⁷¹

6.2.2 A Developing Country's Penal System: The Way Forward

The phrase 'substantial and compelling' in s 51 of the South African Criminal Law Amendment Act 105 of 1997, is presumed to have been borrowed from the Minnesota Mandatory Sentencing Guideline.⁷² However, unlike Minnesota's Sentencing Guideline, s 51 of the 1997 Act offered no guidance on how to apply the 'substantial and compelling circumstances' clause. Courts rightly interpreted this as according them the discretion to depart from the minimum sentences when imposing them would result in a sentence that is disproportionate and therefore unjust.⁷³ The interpretation and application of the provision resulted in considerable differences that put paid to any ambitions of introducing consistency to sentencing. Fortunately, the South African bench is not averse to sentencing guidelines.⁷⁴ It would seem then that the challenge revolves around how best to go about a guideline that carries with it an authority that judges can respect.⁷⁵

Terblanche⁷⁶ once suggested that the English sentencing guideline model would be better suited to the South African context than USA's grid-based model. His reasons were hinged on the comparative advantage that the English approach has over the grid-based system. English sentencing guidelines include statements of principles, which allow more flexibility than the grid-based numerical system.⁷⁷ But perhaps more pertinent to Terblanche's reasons were two important recommendations that the South African Law Commission made in 2000, after it conducted a review of sentencing practice in the country. The Commission recommended

⁷¹ Ibid at 463 & 465.

⁷² SS Terblanche & Julian V Roberts 'Sentencing in South Africa: Lacking in principle but delivering on justice' (2005) 18 *S. Afr. J. Crim. Just* 187-202 at 192.

⁷³ *S v Malgas* 2001 (1) SACR 469 (SAC) at 481 paras A-C.

⁷⁴ *S v Vilakazi* 2009 (1) SACR 552 (SCA) at 558 paras B-C.

⁷⁵ The South African Law Reform Commission gave considerable attention to this subject while it was constituted as the South African Law Commission.

⁷⁶ SS Terblanche 'Sentencing guidelines for South Africa: Lessons from elsewhere' (2003) 120 *SALJ* 858-882 at 881. Terblanche also held the view that the points system of the Dutch Prosecution Service was preferable to the American grid-based system.

⁷⁷ Andrew Ashworth & Julian Roberts 'Sentencing: Theories, principles, and practice' in Mike Maguire, Rod Morgan & Robert Reiner (eds) *Oxford Handbook of Criminology* 5 ed (2012) 867-894 at 881.

legislation that states the basic principles that should underpin sentencing in South Africa, and the establishment of a sentencing council that would develop sentencing guidelines for the country.⁷⁸ Associated with these recommendations were two critical remarks that the Commission also made: first, ‘an ideal sentencing system’ should aim for consistency in sentences; and secondly, it should be mindful of the state’s capacity to enforce those sentences.⁷⁹

The Commission prepared a draft Sentencing Framework Bill that proclaimed a statement of guiding principles. First among these was the requirement that sentences must be proportionate to the gravity of the offence and, within the overall sentencing scheme, be relative to sentences for ‘other categories or subcategories’ of crimes.⁸⁰ Gravity is measured by the harmfulness or risk of harm posed by the offence and the offender’s blameworthiness. The court must also work toward proportionality between the traditional triad in sentencing. That is, the court must seek an optimal balance between the victim’s right to restoration, the need to protect society from the offender, as well as the need to offer the offender an opportunity to reform.⁸¹ A decision about proportionality may also take the offender’s criminal record into consideration and a departure from the guideline may be allowed where substantial and compelling circumstances increase or decrease the offender’s blameworthiness.⁸² Appositely, the proposed principles were infused with elements of restorative justice, as may be deduced from the requirement that courts seek a balance in the triad. However, the proposed primary rationale lies in its emphasis on proportionality, which stresses the deserts principle that an offender should not get more or less than his culpability deserved.⁸³ It may also be pointed out that the bill’s approach echoed existing judicial disposition regarding the objects of punishment;⁸⁴ in the South African experience, the considerable effort that judges make when seeking a balance between the competing aims of punishment is much influenced by salient themes of proportionality. The guidelines proposed by the bill were intended to bring consistency to the application of the

⁷⁸ See South African Law Commission *Report: Sentencing (A New Sentencing Framework)* (2000) chapter 2; see also Stephan Terblanche ‘A sentencing council in South Africa’ in Arie Freiberg and Karen Gelb (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (2008) 191-199.

⁷⁹ Terblanche (2003) op cit note 76 at 193.

⁸⁰ South African Law Commission op cit note 78 at 40.

⁸¹ Ibid.

⁸² Ibid; see also Terblanche (2003) op cit note 76 at 193.

⁸³ Ibid.

⁸⁴ It may even be compared to the modified just-deserts approach adopted in the Minnesota Sentencing Guideline.

sentencing principles and were to be designed to ensure that the committal of offenders to prison stayed within the capacity of the prison and penal system.⁸⁵

There were key elements to the Commission's recommendations for a Sentencing Council. Two institutions, the Sentencing Council and the Supreme Court of Appeal, were to collaborate in developing guidelines on an ongoing basis. At the time these proposals were made, England's Criminal Court of Appeal (the highest court of criminal appeals) and Sentencing Council were in such collaboration. This collaboration and the changes that have since occurred in the United Kingdom will be discussed shortly. For now, it is pertinent to observe that the Law Commission's proposals incorporated elements which go to the heart of the authority and acceptability of the proposed guidelines. For one, the South African Supreme Court of Appeal was to be involved in issuing guidelines. Second, the composition of the proposed Sentencing Council would be representative of the entire criminal justice system. It would include representatives of the judiciary, magistracy, relevant criminal justice departments, sentencing experts from outside the government and representatives of the public who have expertise in victimization.

Had this bill been passed, it could have brought about a 'radical departure from current practice'.⁸⁶ Unfortunately, however, the bill has remained a proposal and the lifespan of 1997 Act was extended repeatedly. Further legislative amendments in 2007 gave a rather permanent face to the temporary arrangement intended by the 1997 Act. Not to be overlooked however, is the fact that the problems that prompted the South African Law Commission to recommend the establishment of a Sentencing Council that will develop sentencing guidelines persist today.⁸⁷ They have also prompted the South African bench to contemplate the desirability of a framework to regulate discretion. In *S v Vilakazi*⁸⁸ the Supreme Court of Appeal, after acknowledging the difficulties that judges experienced during sentencing, expressed the opinion that the

⁸⁵ For the Commission's comments on the principles of the draft bill and proposed guidelines, see South African Law Commission *Sentencing (A new sentencing framework)* (2000) chapter 3, see particularly 56-60.

⁸⁶ See Terblanche (2003) op cit note 76 at 198.

⁸⁷ About eight years later, Terblanche wrote that these problems continue to persist notwithstanding the 'combination of legislation and loose guidance from the appellate courts' that courts have at their disposal. See Terblanche (2006) op cit note 14 at 1-2. At best, the combination offers a loose, piecemeal approach that has failed to enhance consistency and rationality in so complex a matter as sentencing.

⁸⁸ 2009 (1) SACR 252 at 558 paras B-C.

‘sophisticated guideline-system’ recommended by the South African Law Commission in 2000 would have been welcomed by judges.

6.2.3 Rationalizing Sentencing: The UK Experience

As in other penal jurisdictions, the United Kingdom has had its share of concerns regarding sentencing disparities. The reasons for, and the patterns of these concerns are to a large degree similar to those that have been examined earlier in this thesis.⁸⁹ As such, they need not be revisited here. Efforts to redress sentencing disparities began to crystalize in the early 1980s when the Court of Appeal began to issue occasional guideline judgments.⁹⁰ Typically these guidelines judgments focused on harm, the manner it was caused, and features that may increase or reduce culpability.⁹¹ Guideline judgments continued to be issued through 2009 when the Coroners and Justice Act 2009 was passed. The discussion below explores these developments.

6.2.3.1 Guideline Judgments by the Court of Appeal for England and Wales

Guideline judgments are pronouncements in which the Court of Appeal prescribed sentence levels and guidelines. According to Easton:

Such judgments considered sentencing for a whole category of offences or particular sentencing factors, rather than one individual and individualised case, and gave indications of the ‘proper range’ of sentences, the interpretation of sentencing legislation, and listed

⁸⁹ The Criminal Justice Act 2003, which will be discussed shortly, introduced provisions to address the problem of inconsistent sentences. See Rebecca Huxley-Binns & Jacqueline Martin *Unlocking the English Legal System* 4 ed (2014) 342.

⁹⁰ Ashworth & Roberts op cit note 77 at 882. According to Ashworth and Roberts, the movement toward structuring or rationalizing the use of sentencing discretion in England and Wales spans four phases. The first phase started in the early 1980s with guideline judgments from the Court of Appeal. The second phase came with the establishment of the Sentencing Advisory Panel. The movement entered the third phase with the enactment of the Criminal Justice Act 2003, and the fourth phase with the Coroners and Justice Act 2009. However, it should be noted that the practice of issuing sentencing guidelines predates the 1980s. In the preface of a compendium of cases put together by UK’s defunct Sentencing Guidelines Council, the Council made the point that courts had been issuing guidelines for decades. See Sentencing Guidelines Council ‘Guideline judgments: Case compendium’ (2005) iii, available at http://sentencingcouncil.judiciary.gov.uk/docs/web_case_compendium.pdf; accessed 5 February 2014. It would seem then that attribution of guidelines judgment to the pronouncements of the Court of Appeal in the 1980s had to do with the fact that those pronouncements marked a watershed in the movement to rationalize sentencing discretion through authoritative and readily available guidelines.

⁹¹ Nigel Walker & Nicola Padfield *Sentencing: Theory and Practice* 2 ed (1996) 46-47.

particular factors as legitimately aggravating or mitigating the seriousness of the offending and the level of punishment.⁹²

An opportunity to issue a guideline judgment arose when an appeal came before the court for which it considered a sentence guideline needful. The court would then issue a set of statements regarding how sentencing for offences in the same category as the one on appeal ought to be determined. The statements were essentially *obiter* and were not necessarily the *ratio decidendi* in the appeal, even though its principles may be relevant to deciding sentence in that appeal.

Some of the most important guidelines that the Court of Appeal has passed were for rape.⁹³ In *R v Roberts and Roberts*⁹⁴ the court held that ‘rape [was] always a serious crime’ that called for ‘an immediate custodial sentence’, the exception being only where ‘wholly exceptional circumstances’ dictated otherwise. The court’s support for prison sentence was on the premise that it communicated the seriousness of the crime, emphasized public disapproval, warned others and punished the offender.⁹⁵ It also held the view that prison sentences for rapists protected women. Of course, the length of sentence is subject to the circumstances of each case. In the court’s opinion, there will be aggravation of sentence if:

1. The rapist
 - i. injured or threatened injury with a weapon;
 - ii. used violence gratuitously or excessively,⁹⁶ beyond what was necessarily inherent in rape;
 - iii. employed brutal threats;
 - iv. is in a position of trust in relation to the victim; or
 - v. committed different acts of rape on the same woman or on different women;
2. The victim was
 - i. made to endure ‘further sexual indignities or perversions’; or

⁹² Eason & Piper op cit note 49 at 47, see also p 48.

⁹³ The court has also issued guidance for sentencing for other types of crimes. See *R v Willis* [1974] 60 Cr App R 146 (involving sodomy, now no longer an offence in the United Kingdom).

⁹⁴ (1982) 75 Cr App R 242.

⁹⁵ Ibid at 244.

⁹⁶ Walker & Padfield op cit note 91 at 49.

- ii. deprived of her dignity for a period of time;
- iii. very young or elderly; or
- iv. suffered rape or succession of rapes carried out by a group of men.⁹⁷

With respect to mitigation, the court held that:

1. a plea of guilty that was entered into before the victim was subjected to the further indignity of reliving the rape experience in the trial, mitigated sentence. However, its mitigative effect may be negated by aggravating elements in the offence; and
2. there would be mitigation where medical report showed that the defendant was impressionable and could be easily influenced to act against his better judgment.⁹⁸

The *Roberts* guideline principles were revised in *R v Billam*.⁹⁹ New additions to the principles emphasised the need to maintain some sense of proportionality between different offences and to provide a guide regarding sentence duration. Having regard to the seriousness of rape, however, the court observed that sentences tended to be too short.¹⁰⁰ And though the Court of Appeal acknowledged that rape's many mutable factors complicated the task of developing sentencing guidelines,¹⁰¹ it nevertheless set forth an important principle. Being a serious crime, rape necessitated an immediate prison sentence the starting point of which was to be determined by the seriousness of each crime. This essentially recognises that different levels of brutality could be associated with each crime. After reviewing judicial practice, the court adopted a starting point of five years imprisonment where the defendant did not contest the charge and where aggravating or mitigating circumstances were absent.¹⁰² Where the defendant acted in furtherance of a common purpose, or forcefully or unlawfully gained access to where the victim lived, or was in some position of responsibility over the victim, the starting point was eight years. The same starting point applied to the defendant who abducted his victim and held her

⁹⁷ *R v Roberts and Robert* supra note 94 at 244.

⁹⁸ Ibid.

⁹⁹ [1986] 1 All ER 985; the appeals in this case related to ten different convictions for rape.

¹⁰⁰ Ibid at 987 para g; the court may only resort to an alternative sentence in 'wholly exceptional circumstances.' In a noteworthy observation, the Court of Appeal remarked that criminal statistics in 1998, which showed that about 95 percent rape offenders were sentenced to prison terms, also suggested judges needed reminding about what sentence was appropriate.

¹⁰¹ *R v Billam* supra note 99 at 987 para G.

¹⁰² Ibid at 987 para H. See also Wasik op cit note 106 at 48 and 128.

captive over a period of time.¹⁰³ A serial rapist was regarded as a threat to society and therefore liable to 15 years imprisonment or more.¹⁰⁴ Life imprisonment was also considered appropriate where the offender was manifestly perverted, or exhibited psychotic tendencies or gross personality disorder, or where he was likely to be a danger to women for an indefinite time if he remained at large.¹⁰⁵

The starting point, which was lacking in the Minnesota guidelines, was the quantum of sentence that is presumed to be applicable to a first time offender who does not contest the indictment. This was an important innovation that was aimed at consistency and it did help to ensure that sentencers commenced calibrating sentence for similar offences using the same baseline.¹⁰⁶ Salient in the court's views also was the belief that existing sentences for rape offences were not proportionate to the crime. The concomitant of this belief, that punishment should be proportionate to the crime, underlined the 'deserts' basis of the starting point that the court adopted.¹⁰⁷ This would later become pivotal to the guideline structures that were prescribed by subsequent legislation.

Billam added other conditions to the aggravation list in *Roberts*; there will be aggravation where the offence was carefully premeditated, or left the victim with 'especially' serious mental or physical harm. These aggravating circumstances could raise the sentence considerably higher than usual.¹⁰⁸ Regarding the mitigating effect that a plea of guilt would have, the court held that the extent of sentence reduction would depend on the circumstances, including the possibility that a verdict of acquittal could have been returned had the indictment been contested. Previous good character constituted little relevance and the fact that the victim may have acted imprudently, or was sexually active before the crime, is irrelevant to sentence mitigation. Sentence would however be mitigated where the victim's behaviour led the offender

¹⁰³ Ibid at 987 paras H-J.

¹⁰⁴ Ibid at 987 para J.

¹⁰⁵ Ibid at 988 para A.

¹⁰⁶ See Sentencing Council 'Frequently asked questions about sentencing guidelines' available at [http://sentencingcouncil.judiciary.gov.uk/docs/Frequently_asked_questions_about_sentencing_guidelines\(1\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Frequently_asked_questions_about_sentencing_guidelines(1).pdf), accessed February 7 2014.

¹⁰⁷ See Martin Wasik *Emmins on Sentencing* 2 ed (1985) 48.

¹⁰⁸ *R v Billam* *supra* note 99 at 988 paras A-B.

to believe she would consent to sex.¹⁰⁹ Also, attempted rape would attract a lower sentence, especially if the defendant desisted at an early stage. The rationale for this was simple: the offence was not completed. However, the presence of aggravating features may make an attempted offence more serious than some instances of the completed offence.¹¹⁰ For rape offenders below 21 years old, a custodial sentence would be ordinarily appropriate.¹¹¹

The *Billam* principles were consistently applied in subsequent sentencing decisions.¹¹² In *R v Bibi*¹¹³ and *R v Kefford*¹¹⁴ also, the court made prison overcrowding a relevant factor for consideration where a prison sentence is necessary and laid down the principle that a prison sentence may be imposed only when it is necessary. Furthermore, it should not be longer than is necessary to protect public interests, punish the offender and deter him. Guideline judgments also established the principle of totality. The principle regulates consecutive sentencing for multiple offences and requires the court to weigh the overall sentence, in order to ensure that the imposed sentence is not disproportionate to the overall seriousness of the crimes. The principle operates as a discounting or mitigating principle in sentencing for multiple offending, and was first incorporated into the Criminal Justice Act 1991 and subsequently in the Criminal Justice Act 2003.¹¹⁵

¹⁰⁹ Ibid at paras C-D.

¹¹⁰ Ibid at paras D-E.

¹¹¹ Ibid at para E.

¹¹² See Celia Wells & Oliver Quick *Lacey, Wells and Quick Reconstructing Criminal Law: Text and Materials* 4 ed (2010) 536.

¹¹³ (1980) 2 Cr.App.R. (S) 177; it was held that courts must look at each case to determine whether imprisonment is necessary and apply the shortest sentence possible where imprisonment is necessary. Sentence must be consistent with the duty of protecting the public and of punishing and deterring the offender. Sentence should be short in view of the danger of overcrowded prisons. It was held further that medium or long term sentences were appropriate for most cases of robbery and violent crimes, large scale drug trafficking, etc. See Sentencing Guidelines Council (2005) op cit note 89.

¹¹⁴ [2002] 2 Cr. App. R (S) 106; the decision issued a sentencing manual for the offence of obtaining money transfer through deception. The court reiterated the sentencing principle in *R v Bibi* supra, and held that when a court considers imposing a sentence of 12 months or less, particularly if the offender has not had a prior prison sentence, it should consider whether a shorter sentence would not be an effective to satisfy the public interest and punish and deter the offender. See Sentencing Guidelines Council (2005) op cit note 90.

¹¹⁵ See Julian V Roberts and Anne Rafferty 'Sentencing guidelines in England and Wales: Exploring the new format' (2011) Vol. 9 *Crim.L.R.* 681-689.

6.2.3.2 *The Sentencing Advisory Council: An Era of Collaboration*

Although guidelines judgments were *obiter*, courts generally complied with them. However, they were inadequate to address the need for a comprehensive guideline which formed part of an overall strategy to reduce sentencing disparities. For one thing, the Court of Appeal was ill-equipped to undertake the comprehensive project of developing a detailed sentencing guidelines for different categories of crimes; it could only make a cursory attempt at it,¹¹⁶ through piecemeal efforts as opportunities came.¹¹⁷ To address this inadequacy, the United Kingdom enacted the Crime and Disorder Act, 1998. The Act established a Sentencing Advisory Panel (SAP) with responsibilities for drafting sentencing guidelines and advising the Court of Appeal on appropriate forms of punishment that should be imposed. Essentially, the Act created a relationship of collaboration between the Court of Appeal and SAP in the task of developing guidelines.

In view of the Act, the Court of Appeal could no longer act on its own to issue guidelines. It could only do so after requesting and receiving advice on a sentencing matter from the SAP.¹¹⁸ This statutory procedure significantly eroded the control that the court had over the issuance of guidelines. Upon the receipt of a request, the SAP would review existing sentencing law and practice, gather sentencing data, issue consultation papers and confer with the public and with persons or authorities that the Act required it to consult. Thereafter, the SAP formed and communicated its views (advice) on the matter to the court.¹¹⁹ The SAP could also act on its own (i.e., without a request from the Court of Appeal) and decide that a guideline on any criminal matter should be developed. It may also do so upon the request of the Home Secretary.¹²⁰

In 2002, the SAP issued and submitted an advice to the Court of Appeal, wherein it proposed a revision of existing sentencing guidelines for rape. Based on the advice, the court

¹¹⁶ Easton & Piper op cit note 49 at 48.

¹¹⁷ See Andrew Ashworth 'English sentencing guidelines in their public and political context' in Arie Freiberg and Karen Gelbs (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (2008) 112-125 at 112.

¹¹⁸ Ibid.

¹¹⁹ Section 81 of Crime and Disorder Act 1998; see also Ashworth (2008) op cit note 117 at 116-117. A little more elaboration about the panel's modus operandi is provided below in the discussion about changes introduced by the Criminal Justice Act 2003.

¹²⁰ See s 81(2) & (3) for the three ways the Panel commenced the development of a sentencing guideline.

delivered a guideline judgment in *R v Millberry*¹²¹ that retained the basic structure of guideline that was developed in *Billam*, but made significant modifications to accommodate changes that had occurred in legislation and in the nature of the offences since those guidelines were issued.¹²² Essentially, the court accepted the SAP's many recommendations. First, it agreed that weighing the seriousness of each offence of rape should involve three components, namely the degree of harm to the victim, the extent of the offender's culpability and the degree of risk that the offender poses to the society.¹²³ Second, 'relationship and acquaintance rape' – a term which extends to marital rape, rape between persons who had a consensual sexual relationship at the time of the offence and male rape – should be treated with the same level of severity as rape by a stranger. These recommendations were based on research findings regarding public attitudes that rejected any differentiations of gravity between different types of rapes.¹²⁴ Third, the SAP recommended that the sentencing guidelines for male to female rape should apply to male on male rape.¹²⁵ Fourth, it saw no inherent distinction between vaginal and anal rape that could impact sentencing and recommended that a victim who is raped anally and vaginally should be treated as having been raped repeatedly.¹²⁶

Having accepted the proposals, the court went about implementing them by adopting the same starting point for all kinds of rape, while also noting that the appropriate sentence in individual cases would, in the end, depend on a proper consideration of the circumstances of each offence, including the particular circumstances of the offender and victim. Sentence may be

¹²¹ [2003] 1 Cr.App.R. 25 at 396.

¹²² According to the court, the changes include the Sexual Offences Act 1993, which allowed rape convictions for boys below 14 years, the recognition of marital rape in *R v R* [1991] 4 All ER 481, and of male rape as offences by s 142 of Criminal Justice and Public Order Act 1994; the prescription of a life sentence by s 109(5)(a) of the Powers of Criminal Courts (Sentencing) Act 2000 for a second conviction for rape or attempted rape. In the last instance however, the court may depart from the sentence on the basis of exceptional circumstances, but must state its reasons in open court (s 109(3)). See para 6 of the judgment; see also Andrew Ashworth *Sentencing and Criminal Justice* 4 ed (2005) 128.

¹²³ *R v Millberry* supra note 121 at para 8.

¹²⁴ Ibid at para 9; in 2002, the SAP published a report of the feedback from research on the 'relative seriousness of different rapes'. The research elicited 'strong views' in support of removing distinctions, 'in terms of seriousness', 'between male and female rapes or between stranger rapes and relationship rapes'. See Alan Clarke, Jo Moran-Ellis & Judith Sleney 'Attitudes to date rape and relationship rape: A qualitative study' *Research Report 2* (2002) Sentencing Advisory Panel, 24, available at <http://www.hawaii.edu/hivandaids/Attitudes%20To%20Date%20Rape%20and%20Relationship%20Rape%20%20%20%20A%20Qualitative%20Study.pdf>, accessed February 6 2014; see also Ashworth (2008) op cit note 116 at 117.

¹²⁵ *R v Millberry* supra note 121 para 10.

¹²⁶ Ibid at para 11.

mitigated where the offender is the husband of the victim, though this may not necessarily be the case. However, the victim's experiences of bitterness over being raped by someone she trusted may aggravate sentence. To arrive at an appropriate sentence therefore, the court must strike a balance between aggravation and mitigation and may have to pay attention to particular elements of the crime that may have exacerbated the victim's experience of the crime, or stir apprehensions within the victim or the public in the wake of the crime.¹²⁷

The list of proposals that the court agreed to goes on. An offender's culpability differs from case to case and may be reduced if the victim's behaviour conduced to the commission of the crime, such as where she consented to sex but changed her mind at the last moment. His culpability in such a case would be less than if he had intended to rape his victim from the onset. Thus, sentence would be determined – in this particular example, mitigated – to the extent of the offender's culpability. Sentence may also be mitigated where the victim has not been gravely affected by the crime.¹²⁸ Regarding starting points for sentences, the court agreed with the proposals of the Panel and observed that they were not substantially different from *Billam*. The only difference that the court pointed out was in the new emphasis on relationship rape, which draws attention to the fact that victims may still be seriously impacted because there was a relationship with the offender.¹²⁹ The court accordingly reaffirmed the following starting points:

- a. A five year starting point where the case involves a single uncontested offence of rape, provided there are no aggravating features.
- b. The higher starting point of eight years will be imposed either on the basis of victim impact, the level of the offender's culpability, or both, where any of the aggravating features mentioned in *Roberts* or *Billam* are present. In addition to those features, the court added the following:
 - i. the victim is a child or other person 'who is especially vulnerable because of physical frailty, mental impairment or disorder or learning disability';

¹²⁷ Ibid at para 13; the court pointed out that in drawing the balance for instance, it should not overlook the fact that in stranger rape, the victim's fear may be increased by the fact that the offender is an 'unknown quantity', in which case she is confronted with the dreadful fear as to whether the offender is both a rapist and murderer.

¹²⁸ Ibid at para 14.

¹²⁹ Ibid at para 26.

- ii. the rape was ‘racially aggravated’, or ‘the victim was targeted because of his or her membership of a vulnerable minority’;
- iii. rape was repeated in the course of one attack; or
- iv. the offender committed the crime knowing that he was suffering from a ‘life-threatening sexually transmissible disease’. It is irrelevant that the victim did not contract the disease.¹³⁰

Factors that highlight a high level of risk to society will aggravate sentence substantially.¹³¹

¹³⁰ Ibid at paras 19-20.

¹³¹ *R v Millberry* involved three appeals by Robert Morgan, Stuart Lackenby and Christopher Millberry, against sentences for rape crimes. Resolving Morgan’s appeal, the court held that the fact that the crime (which was a relationship rape) was planned and carried out with considerable degree of humiliation and degradation to the victim, who suffered substantially from the crime, made the crime of a nature that justified the aggravated sentence imposed by the trial court. The court also found that the appellant had a relatively high ‘risk of further offending in a similar manner, within the context of personal relationships’, and that he initially denied responsibility. The appeal was accordingly dismissed. Lackenby’s appeal against excessive sentence was also denied. He repeatedly denied responsibility during long interviews by the police, claiming that the victim cooperated with him. He eventually made a plea of guilty at the ‘plea and directions hearing’ but the court, having regard to his attitude during investigations, could only award a modest discount in mitigation of sentence. The fact that the appellant was on the victim’s premises unlawfully, used threats and violence that made the victim fear and plead for her life, and put his victim through several hours of his ‘horrendous, humiliating and frightening’, ‘degrading [and] demeaning ...’ sexual acts that terrified her, aggravated sentence. He raped her vaginally and also attempted anal rape. With regard to the appeal against extended sentence however, the court held that the seven year extension was excessive. An extended sentence is an additional period of imprisonment that the court imposes on top of the term of imprisonment it would have imposed on an offender because it considers the latter term inadequate to prevent him from reoffending and to ‘secure his rehabilitation’. It is issued pursuant to s 85 of the Powers of Criminal Courts (Sentencing) Act. The third appeal involving Millberry, was a male on male rape in which a relationship of trust was abused. The offender was 17 years old, and had been cautioned just about a year before for an indecent assault on an 11 year old boy. The pre-sentence report for that crime indicated he had a high risk of reoffending. His victim in the instant case was 15 years old, who belonged to the same social group as the appellant’s brother. The appellant and victim met two weeks before the commission of the offence. In deciding the sentence, the trial court took cognizance of the fact that the offender was 17 and had made a ‘full and frank admission’, and apparently weighed this against the fact that in the presentence report, the appellant had said he could not give any undertaking that he would not act upon his sexual impulses in the future, meaning he had a high risk of reoffending. Accordingly, the trial court imposed five years of detention in a young offenders’ institution. On appeal, the court held that the youth of the victim, the fact that force was used (though not beyond what was inherent in the act itself), and the significant impact it had on the victim, were aggravating factors. While the court must accept that the offender made a full and frank disclosure, it must not overlook the probation report which said he had a high risk of re-offending, and was therefore a threat to the public and to pubescent boys from the age of 11. That said, the court had regard to the fact that the case was not contested and the plea of guilty was offered early enough. It upheld the appeal and imposed a four year detention period.

- c. The offender is liable to a fifteen year prison sentence or to a life sentence if the crimes attained the level of seriousness for which those terms would have been imposed in *Billam*.¹³²

Millberry reaffirmed the mitigating and aggravating features in *Billam* with one important qualification; the measure of discount (sentence mitigation) that an offender gets for entering a guilty plea depends on how early he made the plea. A plea of guilty that is not given early reduces the percentage discount awardable.¹³³ The court also developed additional grounds of aggravation. These included the perpetration of the crime in the presence of a child, drugging the victim in order to render him or her incapable of resistance and where the offender had a history of sexual assaults against the victim.

Having formulated these and other rules on the basis of the Panel's advice, the court proceeded to warn against rigidity:

‘[W]e would emphasise that guidelines such as we have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers merely adopt a mechanistic approach to the guidelines. It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double accounting must be avoided and can be a result of guidelines if they are applied indiscriminately. Guideline judgments are intended to assist the judge arrive at the current sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge.’¹³⁴

6.2.3.3 *The Criminal Justice Act 2003*

A third wave of reforms in sentencing procedure came with the enactment of the Criminal Justice Act 2003 (CJA 2003). The Act was passed after a government-sponsored review found the SAP-driven scheme fragmentary and inadequate. For example, the scheme was found to be incapable of meeting ‘the need for guidelines on types of sentences and matters of general

¹³² *R v Millberry* supra note 121 at paras 22-23.

¹³³ The court noted that s 152 of the Powers of Criminal Court (Sentencing) Act 2000 required the court to take note of when a plea was made. The court permits a reduction for early plea because it spares the victim the distress of re-enacting the experience in her testimony, and because it shows that the offender realizes his conduct is wrong and regrets it.

¹³⁴ *R v Millberry* supra note 121 at para 34.

principle'.¹³⁵ In other words, the scheme lacked a primary regulating principle (i.e, objective or rationale) that would regulate the type and quantum of sentence that can be imposed. The time had come for a comprehensive guideline with an overall strategy for sentencing all manner of crimes.

CJA 2003 has been described as ushering in a new era of definitive sentencing guidelines. The Act favoured a scheme that vested responsibility for developing comprehensive guidelines in a separate institution called the Sentencing Guideline Council (SGC). This approach was inspired by the rationale that the function of developing guidelines ought to be kept apart from the judicial function of deciding individual appeals. It was also believed that separating the functions would increase the range of public inputs – including inputs from the Parliament – in so important a matter of public policy that sentencing is. The approach was seen as correct in principle because it made it easier to introduce new sentencing principles and alternatives than the Court of Appeal could develop.¹³⁶

I The Process of Formulating Guidelines under the 2003 Act

CJA 2003 retained the SAP, but altered the nature of its obligations to accommodate the new SGC. Although the SAP could carry out activities as it did before, those activities were triggered on the request of the Justice Minister or the SGC. SAP was also mandated to submit its advice to the SGC rather than the court.¹³⁷ The process of formulating the guidelines involved several stages of intensive research, data collection and broad consultations, all designed to ensure there was wide public input and that current sentencing standards were taken into consideration. Thus, the development of a guideline started with the collection of data by the SAP, in order to identify sentencing patterns for particular offences. The SAP then evaluated decisions of the Court of Appeal to ascertain whether they offer sound principles that may be incorporated into the guideline. Legislative provisions were examined – where these were available – and included in

¹³⁵ Ashworth (2008) op cit note 117 at 113.

¹³⁶ Ibid at 113-114.

¹³⁷ Section 171 of the Criminal Justice Act 2003.

the development of a guideline.¹³⁸ Importantly, SAP could also commission empirical studies, as it did on domestic burglary, in ‘order to examine public evaluations of the seriousness of different types of burglary’ and to seek those factors which in the mind of the public should aggravate or mitigate sentence. These very objectives underlined SAP’s empirical research on the ‘relative seriousness of different rapes’.¹³⁹ The Panel then examined responses from the consultations, developed a guideline and transmitted it to the SGC.

The SGC’s procedure for issuing a guide was quite as elaborate as the SAP’s. Whenever it received an advice from the SAP, it formed its views regarding whether to draft a guideline. If a decision to formulate a guideline was made, the SGC was required to consider sentencing patterns in England and Wales, the need to promote sentencing consistency and the cost and relative effectiveness of sentences in preventing re-offending. The SGC was also required to have regard to the need to promote public confidence in the criminal justice system, and to the SAP’s views.¹⁴⁰ Statutorily, the SGC had to publish whatever rules it formulated, first, as draft guidelines. Thereafter, it embarked on a range of consultations with the Secretary of State, such persons as the Lord Chancellor may direct, or persons that the SGC deem fit to consult,¹⁴¹ though it was not obligated to follow their views.¹⁴² The SGC could also consult with the Justice Committee in Parliament,¹⁴³ though this was not required by the Act. A set of ‘definitive guidelines’ – or amendments to existing guidelines – was issued after these consultations.¹⁴⁴

¹³⁸ Ashworth (2008) op cit note 117 at 116-117; the author disclosed instances where the SAP disagreed with a Court of Appeal decision which held that the mitigating effect of a guilty plea diminished in value where the offender was caught in the act, leaving him without a realistic defence. The Panel reasoned that the decision could not be right because the aim of a guilty plea mitigation is to encourage guilty offenders to save the time of the court and spare the victim the distress of testifying by taking a plea of guilty at the earliest opportunity. In pages 116-118 of his book, Ashworth describes the process used by the SAP and SGC to formulate guidelines.

¹³⁹ Ibid at 117.

¹⁴⁰ Section 170(5) of the Criminal Justice Act 2003.

¹⁴¹ Section 170(8) of the Criminal Justice Act 2003.

¹⁴² There are few instances where public views had obvious impact on the development of a guideline, an example being the aforementioned SAP’s reports on public attitudes regarding burglary and different types of rape. However, Ashworth points out that it is difficult to evaluate how public opinion influenced the guidelines. See Ashworth op cit note 116 at 119.

¹⁴³ Ibid at 114.

¹⁴⁴ Section 170(9) of the Criminal Justice Act 2003.

II The Rationale for the SGC's Consultative Process

Consultations were crucial to the development of guidelines under CJA 2003. Although they made the process long-drawn, they fulfilled an important function. They provided opportunities for wide public inputs in formulating guidelines. Consultations were included because the Court of Appeal had been wielding control over a matter of public policy that ought not to be left to judges alone to determine. At the same time however, a reality that could not be sidestepped was the fact that judges typically resisted unduly prescriptive penal statutes – such as mandatory minimum sentences – that stifled discretion.¹⁴⁵ The challenge then was to find an acceptable scheme for structuring sentencing discretion.

To address this challenge and to ensure that guidelines were practical, CJA 2003 settled for an independent agency with strong judicial representation. Proponents of separating judicial function from the formulation of sentencing policy had argued for an independent administrative institution that had the resources and time to develop guidelines. It was also thought that an independent body would insulate sentencing policy from the political pressures that often predispose legislatures to enact disproportionately harsh measures.¹⁴⁶ These considerations led to the establishment of the SGC. Its membership was accordingly made up of ‘judicial and non-judicial’ members, and it was chaired by the Chief Justice. Thus ‘the council [was] constituted by individuals who [knew] what judges [wanted] and [responded] to’.¹⁴⁷

III The duty of Compliance under the 2003 Act, and the problems thereof

A brief examination of the nature of the duty of compliance that was required of courts by the CJA 2003 is needful. Under s 172(1) of the Act, courts were obligated to ‘have regard’ to

¹⁴⁵ Such statutes were abhorred by courts because they violated the principle of proportionality and the need to individualize punishment. Indeed, they were often portrayed as instances of legislative trial (or sentencing), meaning they violated the constitutional doctrine of separation of powers through the legislative usurpation of the role of the court in sentencing. See Kieran Riley ‘Trial by legislature: Why statutory mandatory minimum sentences violate the separation of powers doctrine’ (2010) Vol. 19 *Public Interest Law Journal* 285-310, see particularly pp 298-310.

¹⁴⁶ This – and as the procedure of the SAP and SGC showed – did not make sentencing completely free from legislative involvement. Rather, the object of constituting an independent council was to ensure that responsibility for making the guidelines for implementing legislative prescriptions lay in an apolitical body.

¹⁴⁷ Ashworth (2008) op cit note 117 at 119.

relevant guidelines.¹⁴⁸ Although the Act clearly underscored the fact that guidelines were intended to be definitive,¹⁴⁹ the language employed in s 172(1) meant that courts ‘simply had to consider’ applicable guidelines, but not necessarily follow them. Section 174(2) of the Act affirms this interpretation; the provision permitted courts to impose alternative sentences (that is, to impose sentences outside the prescribed sentence range), provided it gave reasons for doing so.¹⁵⁰ These provisions convey the discretionary nature of the court’s sentencing function; courts retained enough discretion to roam between category ranges within the overall range in offence-specific guidelines. Compared to the subsequent Coroners and Justice Act 2009, CJA 2003 allowed considerably more discretion, so much so that a 2008 review of CJA 2003 concluded that s 172 offered ‘the least prescriptive test’. Consequently, the review called for sentencing guidelines with ‘a greater degree of presumption’.¹⁵¹

Be that as it may, CJA 2003 drove up the use of sentencing guidelines significantly, indicating that judges supported them.¹⁵² Even though departures were permissible, the guidelines were still definitive.¹⁵³ Thus, courts were ordinarily expected to apply them. However, the long-drawn approach to developing the guidelines posed its own predicament; it ensured that the SGC’s attention was focused on individual offences over long periods of time. This made attention to the development of comprehensive guidelines that covered all offences impossible.

¹⁴⁸ The precise wording of s 172 (1) is as follows:

Every court must—

(a) in sentencing an offender, have regard to any guidelines which are relevant to the offender’s case, and
(b) in exercising any other function relating to the sentencing of offenders, have regard to any guidelines which are relevant to the exercise of the function.

¹⁴⁹ Section 170(4) & (9).

¹⁵⁰ Julian V Roberts ‘Sentencing guidelines and judicial discretion: Evolution of the duty of courts to comply in England and Wales’ (2011) 51 *Brit. J. Criminol.* 997-1013 at 1001.

¹⁵¹ *Ibid* at 1006.

¹⁵² According to Ashworth and Roberts, the majority of sentences in the lower courts were imposed with the aid of the Magistrates’ Court Sentencing Guideline (2008). The greater number of sentences imposed by the crown court were also with the use of guidelines. See Ashworth & Roberts *op cit* note 77 at 882.

¹⁵³ Section 170(4)&(9) of CJA 2003.

Since the SGC's approach was necessarily piecemeal, the Court of Appeal retained the default role of issuing guidelines for offences for which the SGC had not issued guidelines.¹⁵⁴

6.2.3.4 *The Coroners and Justice Act 2009*

In 2010, significant changes were introduced to the sentencing scheme. The changes followed two government-appointed reviews that were prompted by a surge in committals to prison, lengthier sentences and a corresponding surge in prison population. The first review was led by Lord Carter, whose report stated that the condition of the prison had become unsustainable. He recommended strengthening existing sentencing guidelines and establishing a Working Group to study how to refine them. Following these recommendations, the Sentencing Commission Working Group was created in 2008. The Working Group studied different guideline systems, and rejected numerical guidelines (such as the Minnesota guideline), recommending instead an overhaul of the existing arrangement in order to enhance greater judicial compliance. The result of the ensuing overhaul was the Coroners and Justice Act 2009 (CJA 2009), which came into force on 13 June 2011. As Roberts¹⁵⁵ describes it, CJA 2009 was the response to a call for higher compliance with sentencing guidelines. It did in fact instate stricter compliance than was the case under CJA 2003.

Yet another significant change that the Working Group recommended came with the abolition of the SAP and SGC by s 135 of the 2009 Act¹⁵⁶ and their replacement by a 'single authority', the Sentencing Council of England and Wales (SC), by virtue of s 118 of the Act.¹⁵⁷ The new SC comprises judicial members and non-judicial members, with the judicial members being in the majority. A judicial member appointed by the Chief Justice chairs the Council.¹⁵⁸

¹⁵⁴ Indeed, the court issued guidelines regarding shop thefts in *Page* [2005] 2 Cr App R (S) 221. It also issued non-prescriptive guidance on provisions of UK's Sexual Offences Act 2003 before the SGC subsequently adopted guidelines. See Ashworth (2008) op cit note 117 at 120-121.

¹⁵⁵ Julian V Roberts 'Structured sentencing: Lessons from England and Wales for common law jurisdictions' (2012) Vol. 14 No. 3 *Punishment & Society* 267-288 at 270-271; Roberts (2011) op cit note 148 at 2-3; see also s 125(1) of Coroners and Justice Act 2009.

¹⁵⁶ See also Schedule 23 Part 4 of the Act.

¹⁵⁷ See also Ashworth & Roberts op cit note 77 at 882.

¹⁵⁸ See Schedule 15(1) & (2); there are eight judicial members, and the appointment of the chairman or his *pro tem* shall be with the consent of the Lord Chancellor. See also Roberts (2012) op cit note 155 at 271-272.

The new legislation and the establishment of the SC ushered in a new era of sentencing in England and Wales.

I Duties of the Sentencing Council

The SC's functions are defined in fairly detailed terms in CJA 2009. To start with, the SC is vested with the responsibility of developing guidelines. The guidelines 'may be general in nature or limited to a particular offence, particular category of offence or particular category of offender'.¹⁵⁹ The guidelines shall also include rules regarding the mitigation of sentence on a plea of guilty and 'the application of any rule of law as to the totality of sentences'.¹⁶⁰ It may also prepare guidelines regarding other matters¹⁶¹ and may review and revise its guidelines periodically.¹⁶² The SC's procedure is much the same as the SGC's before it. It starts with the publication of a draft guideline, which then proceeds to a series of mandated consultations and terminates with the issue of definitive guidelines.¹⁶³ Section 120(11) provides a list of matters to which the SC must have regard when developing guidelines. These include sentencing patterns in England and Wales, the need for sentencing consistency and how sentencing decisions impact victims, 'the need to promote public confidence in the criminal justice system' and 'the cost of different sentences and their relative effectiveness in preventing re-offending'. The SC shall also take the results of monitoring the operation and impact of its guidelines into consideration.¹⁶⁴

¹⁵⁹ Section 120(2).

¹⁶⁰ Section 120(3); the provision makes reference to s 144 of the Criminal Justice Act 2003 which deals with sentence reduction for plea of guilty. Section 144(a) provided that the measure of discount shall be influenced by the stage of the proceeding at which an intention to enter the plea was made, and the circumstances in which that intention was communicated.

¹⁶¹ Section 120(4).

¹⁶² Section 120(9).

¹⁶³ Section 120(5), (6), (7), (8) & (10); the SC must consult the Lord Chancellor and such persons as the Lord Chancellor may direct, the Justice Select Committee of the House of Commons, and such other persons as the SC considers appropriate.

¹⁶⁴ The monitoring function is carried out under s 128 of the Coroners and Justice Act 2009. Specific things which the SC is required to monitor include the frequency and extent of judicial departures from the guidelines, the factors that influenced sentences that courts impose, the impact that the guidelines have on promoting sentence consistency and public confidence in the criminal justice system.

The Act also stipulates other ‘monitoring’ functions that the SC must discharge. These include publishing its evaluations of the resource implications of the guidelines,¹⁶⁵ monitoring ‘the operation and effect’ of guidelines (in order to draw conclusions about compliance)¹⁶⁶ and promoting awareness about the guidelines.¹⁶⁷ Transitional provisions in the Act preserve the guidelines that predated the 2009 Act¹⁶⁸ and allow the Lord Chancellor to issue provisions that empower the SC to discharge the functions that were formerly discharged by the SGC, until such a time that the provisions of the CJA 2003 under which those functions were discharged are repealed.¹⁶⁹

II The Structure of the Guideline

Section 121 of the Act lays out the framework that every guideline should follow. To start with, guidelines should, as much as the nature of the offence reasonably permits, describe the varying degrees of seriousness involved in the commission of a particular offence.¹⁷⁰ Offence seriousness is determined by the following factors:

- a. the culpability of the offender;
- b. the harm that was occasioned by the offending act, or intended to be occasioned, which foreseeably could have been caused by the act; and
- c. other factors that the SC deems ‘particularly relevant’ to the question of seriousness for that offence.¹⁷¹

¹⁶⁵ Section 127; the resource assessments are an evaluation of the likely resources required for the provision of prison places, probation services, and youth justice services. Resource assessments shall always be kept under review and revised as the need arises.

¹⁶⁶ Section 128; the section requires the SC to draw conclusions on the frequency and extent of departures from guidelines, the factors that influence the sentences imposed by court, how the guidelines impact the promotion of sentencing consistency and public confidence in the criminal justice system.

¹⁶⁷ Section 129; this function extends to publishing information about sentencing practice for individual magisterial districts and areas that fall under the jurisdiction of Crown Courts, for sentences imposed by courts in England and Wales, and ‘the cost different sentences and their relative effectiveness in preventing re-offending’.

¹⁶⁸ Under Schedule 22 Part 4 para 28(1)(b), the Lord Chancellor may make provisions for sentencing guidelines that predated the act to be treated as guidelines issued by the SC. Ashworth and Roberts have also written that the old guidelines that were issued by the SGC continue to apply until such a time that the SC ‘revises and reissues them’. See Ashworth & Roberts *op cit* note 77 at 883.

¹⁶⁹ Schedule 22 Part 4 para 28(1)(a).

¹⁷⁰ Section 121(2); the provision describes it as ‘categories of case involving the commission of the offence’.

¹⁷¹ Section 121(3) of Coroners and Justice Act 2009.

Essentially therefore, the SC must develop separate guidelines that reflect the different categories or subcategories of each offence. Offence categories are defined according to levels of the harm or risk involved (i.e., seriousness). Corresponding to each offence category or subcategory is a sentence range – called a category range in the guideline – which consists of a range of years,¹⁷² much like the sentence range in the Minnesota guideline. The sentencer's role is to identify the offence category that bears the closest semblance to the case at hand and apply the corresponding sentence range. However, and as earlier pointed out, a unique feature of the SC's guidelines is the 'sentencing starting point' they incorporated in each category range.¹⁷³ The sentencer commences his calibration of punishment from this 'point' and may adjust the sentence up or down to reflect his evaluation of the aggravating and mitigating elements of the crime. Assisting this process is a list of aggravating and mitigating factors that is provided in the guideline.¹⁷⁴ These factors may include statutory factors, or such other mitigatory factors that the SC may consider relevant. The guidelines may also include criteria for determining what weight may be attached to the offender's previous convictions.¹⁷⁵ How these requirements are met in offence-specific guidelines shall be discussed subsequently.

III The Duty of Compliance under the 2009 Act

The 'critical element' in any guideline is the extent to which it restricts courts. Rigidity in guidelines is not advisable, because it prevents sentencing outside a prescribed range, except in exceptional circumstances. Such a standard may fetter discretion unnecessarily. At the same time, however, guidelines that permit sentencers to go beyond the sentence range may impede consistency.¹⁷⁶ CJA 2009 struck a middle course between these concerns by incorporating a more directive posture on compliance that was markedly different from the position under CJA 2003. While CJA 2003 allowed courts much more discretion through the requirement that they

¹⁷² Section 121(4).

¹⁷³ Section 121(5); this provision shows the influence that guideline judgments had on CJA 2009 and guidelines. Starting points enhanced the acceptability of the guidelines to sentencers.

¹⁷⁴ Section 121(5) & (10) of CJA 2009; see also Sentencing Council 'Frequently asked questions about sentencing guidelines' available at [http://sentencingcouncil.judiciary.gov.uk/docs/Frequently_asked_questions_about_sentencing_guidelines\(1\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Frequently_asked_questions_about_sentencing_guidelines(1).pdf), accessed 7 February 2014.

¹⁷⁵ Section 121(6).

¹⁷⁶ Roberts (2012) op cit note 155 at 267-288.

only have regard to – but not necessarily follow – relevant guidelines,¹⁷⁷ s 125(1) of the 2009 Act obligates courts to follow offence-specific guidelines. The emphasis on offence-specific guidelines is a defining hallmark of CJA 2009. The provision also obligates judicial compliance with any other sentencing guidelines that are relevant to the exercise of any other function related to sentencing. This other requirement may be seen as a further indication of legislative intention to bring those other elements of sentencing that are not offence specific – such as when the court seeks to apply the totality principle, or extend sentence, or even discount sentence on the basis of a plea of guilty – within the rationalized framework that the Act provides.¹⁷⁸ The only reason a court may excuse itself from complying with the guideline is where it is satisfied that compliance would not serve ‘the interests of justice’. The ‘interests of justice’ clause suggests that s 125(1) permits a limited range of discretion that is defined by considerations of fairness.

However, some leeway is embedded in s 125(3). The provision obligates the court to impose a sentence within the offence range in the relevant guideline and to decide which of the various offence categories within that guideline ‘best resembles’ the case at hand. The purpose was to help the court determine the starting point for sentence. With regard to this obligation however, nothing in the provision shall be read as imposing a ‘separate duty’ on the court to select a sentence within the category range. A court that selects a sentence for a different category range does not have to explain that choice – i.e., the sentence does not have to be selected from any particular category of seriousness. An obligation to justify departure only arises when the court imposes a sentence that is ‘outside the overall offence range’.¹⁷⁹

Since the SC was created in 2010, it has issued six definitive guidelines, the first of which was on assault.¹⁸⁰ The first guideline was issued pursuant to s 120 of CJA 2009¹⁸¹ and replaced

¹⁷⁷ Ibid at 274; see also Roberts & Rafferty op cit note 114 at 687.

¹⁷⁸ That is, the court may apply its discretion to such other elements but within the safeguards provided therefore in the sentencing guideline.

¹⁷⁹ Roberts & Rafferty op cit note 115 at 687.

¹⁸⁰ The other guidelines covered burglary, overarching principles of allocation, totality and TICs [an acronym for offences taken into consideration which means], dangerous dogs and sexual offences. See Sentencing Council ‘Sentencing guidelines’ available at <http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm>, accessed 21 January 2014; See also Sentencing Council ‘New sentencing guideline gives greater focus to impact of sex

the guideline before it.¹⁸² Issuing the new guideline was a significant step because it followed the structure devised by the Act. It is discussed below. Being the first, it provided a model that subsequent guidelines were expected to follow.¹⁸³

6.2.3.5 *The Guidelines on Assault Occasioning Actual Bodily Harm: How it Works*

In 2011 the SC issued a definitive guideline on assault.¹⁸⁴ The guideline's structure was significantly different from previous guidelines by the SGC, particularly with regard to the nine-stepped procedure it established for setting sentences. The first two steps are pivotal to determining sentence and are therefore explored below.¹⁸⁵ There are five offence ranges in the guideline,¹⁸⁶ each of which is divided into three categories of seriousness. Fixing a sentence has to go through the nine steps and a sentencing starting point is identified for each category of seriousness.¹⁸⁷ Roberts and Rafferty provide a useful analysis of the structure of the sentencing guideline for 'assault occasioning actual bodily harm' (ABH).¹⁸⁸

Step One stratifies ABH into three layers or categories of seriousness. It allocates a sentence range and starting point for each category and requires the court to determine which one

offenders on victims' available at <http://sentencingcouncil.judiciary.gov.uk/media/974.htm> accessed 21 January 2014.

¹⁸¹ Sentencing Council 'Assault: Definitive Guideline' (2011) available at http://sentencingcouncil.judiciary.gov.uk/docs/Assault_definitive_guideline_-_Crown_Court.pdf, accessed 21 January 2014.

¹⁸² Roberts & Rafferty op cit note 115 at 681; the previous guideline was issued by the SGC in 2008.

¹⁸³ Ibid.

¹⁸⁴ See note 181 above.

¹⁸⁵ Steps three to nine of the guideline cover the reduction of sentence under the Serious Organized Crime and Police Act; the reduction and magnitude of reduction of sentence for plea of guilty; the imposition of extended sentence having regard to Chapter 5 of the Criminal Justice Act 2003; the application of the totality principle where an offender is to be sentenced for more than one offence, or is already serving term, having regard to the need to ensure that the total sentence is just and proportionate; the making of compensation and other ancillary orders, the duty of court to explain the effect of sentence to the offender, and to take time served on remand or bail into consideration when determining sentence. Roberts remarked that the guidelines' structure promotes consistency by prescribing a series of steps the court must follow. See Appendix C for guideline extracts; see also Roberts (2012) op cit note 155 at 278.

¹⁸⁶ These include 'Causing grievous bodily harm with intent to do grievous bodily harm/Wounding with intent to do grievous bodily harm'; 'Inflicting grievous bodily harm/Unlawful wounding' and 'Racial/religiously aggravated GBH/Unlawful wounding'; 'Assault occasioning actual bodily harm' and 'Racially/religiously aggravated ABH'.

¹⁸⁷ The starting point is the 'position within a category range from which to start calculating a provisional sentence'; see Appendix C.

¹⁸⁸ Ibid.

of these categories applies to the offence before it. A 'Category 1' offence must involve a greater level of harm and culpability'. Normally 'serious injury' must also be present and the corresponding category range is '1 – 3 years' in custody. A 'Category 2' classification would apply where the facts of the offence indicate 'greater harm' and 'lower culpability', or 'lesser harm and higher culpability'. 'Serious injury must normally be present' and the corresponding category range is a 'low-level community order to 51 week's custody'. A 'Category 3' offence also involves two elements, namely 'lesser harm and lower culpability' and attracts a 'Band A fine – high level community order'.¹⁸⁹ Each of these categories has a number of principal factual elements (or aggravating factors) which help to place the case at trial within one category of seriousness or the other.

The principal factual elements consist of a combination of harm and culpability indicators¹⁹⁰ that help to determine what offence category should apply to the case at hand. Determining sentence involves a two-staged process of evaluation. First, the court determines the culpability of the offender and the harm occasioned or intended by his criminal act, having regard to the main facts. Principal factual elements help to place the crime in an offence category (that is, match the case to a category of seriousness).¹⁹¹ Because the new guideline places the elements at the heart of matching a particular case to an offence category, they have been said to exact the 'greatest influence on sentence severity'.¹⁹² The list is exhaustive, meaning courts are restricted to considering only those elements that appear on the list when determining what sentence range is appropriate.

¹⁸⁹ Ibid at 12, 27; A 'Band A fine' is 25 - 75 % of relevant weekly income', with the starting point at 50%.

'Community orders' could be one of three levels, ranging between low to medium and high level orders.

¹⁹⁰ Ibid; an offence indicates greater harm where the injury (which may include transmission of disease) is serious in the context of the offence, or where the crime was perpetrated on a particularly vulnerable victim, or with sustained or repeated assaults on the victim. The offence indicates lesser harm if the resulting injury was less serious in the circumstances of the crime. Indicators of higher culpability include a combination of statutory and other aggravating factors. The statutory factors are indicated where the offence was motivated by hate, the victim's (presumed) sexual orientation or disability. Other aggravating factors include where the offence involved substantial premeditation, or a weapon was used, playing a lead role in the commission of the offence, causing more harm than was necessary for the commission of the offence, etc. Lower culpability is indicated where there was no premeditation, the offender played a minor role, or had mental disorder or learning disability that could be linked to the offence, etc.

¹⁹¹ Ibid at 12; Roberts & Rafferty op cit note 115 at 683; see also Roberts (2012) op cit note 155 at 276-277.

¹⁹² See Roberts & Rafferty op cit note 115 at 682-683; the authors explain that offences which did not involve premeditation fell to the lowest category, and were punished through non-custodial measures, and that under the scheme, 'serious, but relatively spontaneous assaults may ... have attracted less than proportionate sentences'.

Once the offence category has been determined, the process of ‘fine tuning’ or refining the sentence commences. Step Two is the most significant part of this process; it provides the starting point within the category range that corresponds to the relevant offence category, which the court must employ to arrive at an appropriate sentence. For instance, the starting point when the facts and circumstances place the offence in ‘Category 1’ is one year and six months’ imprisonment. The starting point would apply regardless of the offender’s plea or criminal history. However, the category range, which represents the range between the minimum and maximum sentence that may be imposed for that offence, is one to three years’ imprisonment. The court will adjust the starting point upward if the facts are particularly serious, as it would be expected to do when the commission of the offence indicates the presence of the ‘principal factual elements’ enlisted in step one. The sentence at this stage is only ‘provisional’. The court may make further adjustments, using a non-exhaustive list of additional factual elements that help to measure the seriousness of the offence, the culpability of the offender and such features that may indicate ‘personal mitigation’. These additional elements are designed to fit punishment into ‘the context of the offence and factors relating to the offender’. The court’s duty is to ‘identify whether any combination of these, or other relevant factors, should result in upward or downward adjustment from the starting point’.¹⁹³ Further improvements to the provisional sentence can be achieved by applying the remaining seven steps in the sentencing process.¹⁹⁴

A couple of salient points need to be made about the guideline before ending this section. First, courts may impose sentences outside the identified category range if after considering the additional factual elements, they are satisfied that a departure from the range is needful. Secondly, the guideline incorporates statutory threshold requirements for custodial and community order sentences; with regards to ‘Category 2’ offences, the guideline requires the court to consider whether the custody threshold has been passed, and if so, whether a custodial sentence is unavoidable. If it is unavoidable, it should consider whether sentence can be suspended. In relation to ‘Category 3’ offences, the court is also required to consider whether the

¹⁹³ Sentencing Council (2011) op cit note 181 at 13, but see 12-13; see also Roberts & Rafferty op cit note 115 at 684-685.

¹⁹⁴ See Roberts (2012) op cit note 155 at 276-280.

community order threshold has been passed.¹⁹⁵ These provisions fulfil the important function of reserving custodial sentences for the most serious ABH crimes, or as a last resort in cases for which alternative measures may be more appropriate. As Roberts and Rafferty explain it, they are ‘a salutary reminder to sentencers of the need to consider a hierarchy of sanctions and the statutory criteria which must be fulfilled before disposals are imposed’.¹⁹⁶

6.2.3.6 *Some Criticisms of the Guideline System*

The new guideline system is not without challenges. Its attempt to allocate factual elements to Steps One and Two came short of creating ‘completely airtight’ classifications. That in itself may not be a problem, but potential problems may arise when the circumstances of a crime are such that the elements that accentuate seriousness and offender culpability fall under Step Two, rather than Step One.¹⁹⁷ This could result in the imposition of a sentence that is less than what the offence deserves. Also, the allocation of criminal history, which is usually a serious factor in determining sentence severity, to Step Two where its impact on the severity of sentence is less, diminishes its aggravating effect.¹⁹⁸ Yet another problem arises from the lack of clarity regarding whether a court’s discretion to review a sentence upward from the starting point is restricted to the sentence range that corresponds to that offence category, or whether that discretion extends to selecting a sentence from a higher category in Step One.¹⁹⁹

Not to be ignored also is the quantum of discount that should be allowed for a plea of guilty. In Roberts’²⁰⁰ view, the issue exposes the political tensions that emerge between government, independent guideline authorities and the judiciary in their efforts to shape sentencing policy, as well as the impact that fiscal considerations have on such efforts. Early guilty pleas are encouraged because this saves the state the costs of gathering evidence for

¹⁹⁵ Sentencing Council (2011) op cit note 181 at 13.

¹⁹⁶ Roberts & Rafferty op cit note 115 at 685.

¹⁹⁷ Roberts illustrates by pointing out that ‘targeting a vulnerable victim may not always be more important than committing an offence which results in the victim having to leave her home’. See Roberts op cit note 154 at 277.

¹⁹⁸ Ibid at 277.

¹⁹⁹ Ibid. In another publication however, Roberts and Rafferty suggest the obligation to explain departure from the guidelines arises when sentence is imposed beyond the overall offence range. Roberts & Rafferty op cit note 114 at 687.

²⁰⁰ Roberts op cit note 154 at 278.

successful prosecution. In principle therefore, the degree to which sentence is discounted depends on how early in the criminal process the defendant communicates his intention to enter the plea. The earlier the intention is communicated, the higher the measure of discount and vice versa. However, setting the precise measure has often been a controversial exercise. A 2007 guideline by the SC now sets the discount for a plea that is tendered at the earliest opportunity at one-third of the prison sentence.²⁰¹

Notwithstanding the above challenges, the English guidelines have their strengths. While concerns have been expressed that discounting sentence for guilty pleas results in sentences that do not reflect the severity of the offence, those concerns can be moderated. Sentences that reflect the gravity of the harm and culpability may still reflect proper consideration for the contrition that is expressed in a guilty plea that is communicated early. Such sentences are consistent with the principle of parsimony and should be encouraged. At any rate, the English guideline system offers a credible alternative, a middle ground as it were, between rigid numerical guidelines and guideline systems that are loosely regulated by judicial statements of guiding principles. At the heart of it, the English guideline is a combination of numerical values and definitive principles that can be adjusted with a considerable measure of flexibility, all within a framework that enhances predictability. It is rooted in a tradition of considerable judicial familiarity with sentencing that makes it agreeable to sentencers. When applying it, sentencers are not faced with a set of rules that they are not adept at applying. It is equally an important indicator of their suitability that the guidelines are issued by an autonomous administrative agency where judicial officers hold the majority.²⁰²

²⁰¹ In 2010, government issued a Green Paper which proposed to increase the amount of discount by up to 50 percent, and a further discount where the defendant also assisted the prosecution. Thus, an offender may have more than 50 percent of his sentence judicially discounted, and still end up on an early release programme. The underlying reason for the proposal was its potential to save costs; prosecutors would be spared lengthy preparations to prove guilt. However, discounting for guilty pleas has been criticized as violating proportional sentencing, and for its potential to ‘undermine public confidence in sentencing’ by antagonizing victims and conveying the impression that the criminal justice system favours the offender. Ongoing research suggests that public support for guilty plea discounts is limited, and that there is no support for it where serious crimes are involved. See Roberts (2012) *op cit* note 155 at 278 – 281.

²⁰² *Ibid* at 281-282.

6.3 Distilling the Key Elements of the Models Examined

The point was made earlier that the English model has been preferred to the grid based system because of the flexibility it offers. Notwithstanding the differences this suggests, there are important similarities at the heart of the underlying principles that have made the models successful in their respective jurisdictions. First, both models were hinged on a political rationality that supported vesting responsibility for making sentencing guidelines on an independent specialized agency, in order to separate the public policy function of developing sentencing guidelines from the judicial function of imposing sentences. The rationality was pertinent, as it facilitated the development of an overall sentencing strategy that courts were not adequately equipped to do. It also helped to insulate the formulation of sentencing policy from political influences by politicians who often come under public pressure to adopt tough measures against crime.

Vesting responsibility for developing guidelines in an independent agency also expanded the range of public inputs in the guidelines. This was especially the case with the English guidelines. The sentencing guidelines for burglary and rape – which the SAP and SGC developed - are examples, as both were developed after public consultations to determine how the public viewed the crimes and the punishments it deemed to be appropriate. All told, the consultations enriched the outcome of the guidelines. Such inputs would not have been possible if guideline development was left to the courts as courts do not necessarily maintain such ties with the community that would enable them to gauge public opinion. Even though judges may sometimes be sensitive to how the public reacts to punishments for serious crime, Roberts²⁰³ points out that it is not so obvious that public perceptions do in fact have a demonstrable impact on sentencing in individual cases. Besides, suggestions that sentences should be influenced by public opinion may run against notions of judicial independence. Traditionally, courts shield themselves from public pressure.²⁰⁴

The constitution of the sentencing guidelines agencies is also an important feature of the models. The agencies are headed by judicial officers. In the Sentencing Council for England and

²⁰³ Julian V Roberts 'Sentencing policy and practice: The evolving role of public opinion' in Arie Feiberg and Karen Gelbs (eds) *Penal populism, sentencing councils and sentencing policy* (2008) 15-30 at 16-21.

²⁰⁴ Ibid at 24.

Wales, judicial members form the majority. Besides the judicial members, membership also includes persons who have expertise in criminal prosecution and defence, policing, correctional services, sentencing policy, victim's welfare, etc.²⁰⁵ This arrangement ensures that guidelines reflect the views of all critical stakeholders, including representatives of the judges who will apply them.

The next notable features are within the structure of the sentencing guideline. Here, the English model's approach is preferable; the guideline categorizes offences into different levels of seriousness against which individual cases may be matched. An important guiding aid in this scheme is the 'sentencing starting point', which applies to all offenders, regardless of criminal history and guilty plea.²⁰⁶ Without it, sentencers may commence fixing sentences at different points within a given sentence range, guided only by their appreciation of the aggravating and mitigating elements of the crime that should influence the choice and quantum of punishment. Sentences set under such circumstances can hardly achieve consistency. The starting point was introduced to resolve this.

Another critical feature for consistency is the list of principal factual elements, which constitutes the first checklist in the process of setting punishment. The list is exhaustive, meaning the scope of factors that could define offence seriousness is confined to the elements on the list. They are the precise elements that define how the sentencer should address cases of particular gravity. A second non-exhaustive list of 'additional factual elements' occupies the second line in the sentencing process and is devoted to refining or contextualizing the sentence. The combination of principal and additional factual elements is very instructive; principal factual elements fulfil the important function of delineating discretion, of infusing greater certainty or predictability into the specific elements that should determine categories of seriousness. Once the category is determined, the 'additional factual elements' open the door to the sentencer's appreciation of how the facts and circumstances of the case should reflect in the final outcome of

²⁰⁵ See Minnesota Sentencing Guidelines Commission 'Commission member selection' available at <http://mn.gov/sentencing-guidelines/about/membersselection/>, accessed 9 February 2014; see also Schedule 15 of CJA 2009.

²⁰⁶ Roberts and Rafferty op cit 115 at 684.

sentence. The combination narrows the foreseeable margin of sentence disparity which would have been wide if judges were at complete liberty to interpret or define offence seriousness.

A few other important features are worthy of mention. The guideline maintains a threshold that reserves prison sentences for very serious forms of ABH and as a last resort. This serves as a check against the indiscriminate use of prison sentences. Furthermore, category ranges and starting points are designed in such a way that they introduce gradation between the sentences applicable to each offence category. This brings about relative proportionality between sentences for different levels of seriousness and culpability, not just for ABH, but between the different forms of assault identified by SC's definitive guideline for assault. There are six types of assault in the guideline and each assault type is divided into three offence categories. As per the types, presumptive sentences are allocated in a manner that reflects the relative seriousness of each. The highest sentence that a court may apply under the definitive guideline is 16 years' custody, for '[c]ausing grievous bodily harm with intent to do grievous bodily harm'.²⁰⁷ On the other hand, the least sentence ranges between a discharge and a 'Band C fine' for common assault.²⁰⁸ Between these sentences are different other sanctions that reflect the relative seriousness of each assault type and offence category. This internal gradation between category ranges shows that the overall strategy of the guideline gave careful holistic consideration to the relative weight of sanction that should attach to each offence category in the guideline. There is therefore a relationship of proportions between the different sentences. In principle, such relative proportionality ought to be sought vis-a-vis other offences.

To make a final point, while the success of the Minnesota guideline has been attributed to the existence of a primary rationale and legislative clarification of how other aims of sentencing should feature in the imposition of sentences, no such feature can be found in English sentencing statutes and guidelines. Yet, the English model is no less successful and its deserts basis is clear. The success of the model must be attributed to the clarity with which English guidelines categorise offences and attach sentences, and to the relative expertise and familiarity of English courts on the subject of sentencing. Hence, a legislative statement of the primary aim of

²⁰⁷ Sentencing Council (2011) op cit note 181 at 5.

²⁰⁸ Ibid at 24, 27. A Band C fine is 125%-175% of weekly relevant income.

sentencing and of how the other aims may influence sentencing may not necessarily be indispensable. However, for jurisdictions that are deficient in relevant expertise, or do not have guidelines that are as descriptive as the English guidelines, a legislative statement may be a useful way to start.

6.4 Conclusion

In its remarks about the need for guidelines in South Africa, the South African Law Commission²⁰⁹ said that an ‘ideal sentencing system’ should aim for sentencing consistency and be mindful of the state’s capacity to enforce those sentences. This remark emphasises the relevance of two important principles that should be integral to every guideline. The first is proportionality, which in this thesis, has been taken to mean that sentences should both match offence severity and instate relative proportionality between sentences for different offences. A concomitant of proportionality is the principle of equity, which dictates that like cases be treated alike and that cases that are different in a substantially significant respect are subjected to punishments that reflect that difference. The second principle is parsimony. It emphasises the need for courts to direct their minds to the capacity of states to implement the sanctions they impose, and to resort to prison sentences as a last measure.

The models that this chapter looked at were designed to uphold both principles, even though the points of emphasis for each differed in a few respects. The Minnesota guidelines were developed with the express goal of reducing prison sentences and keeping prison levels within the state’s prison and correctional resources. However, the rigidity of the guideline, together with the frequent foray of the legislature into sentencing policy, impeded both goals. Indeed, they prompted sentencers and attorneys to find ways to skirt the guidelines. An evidence based approach to sentencing evolved out of these attempts. On the other hand, the English system fared better due to its flexibility, its lucid statements of principles and how those principles should apply. Its adoption of custodial thresholds bore ample testimony to the higher

²⁰⁹ South African Law Commission op cit note 78 at 20 and 25; see also Part III Chapter 1 of the Commission’s report.

bar it set for custodial dispositions. Properly applied, the guideline can ensure that only serious offenders are committed to prison and that prison population is kept within capacity. Apparently, the level of judicial involvement in developing the guidelines, both through the Court of Appeals guideline judgments and the involvement of judicial members in the Sentencing Council, also contributed to the success of the guidelines.

For Nigeria, the challenge of evolving a guideline that achieves consistency and parsimony must face up to the peculiar challenge of the country's poor attention to penal policy. Until deserved attention is given to the establishment of a sentencing guidelines agency, the Country's Supreme Court may need to take up the challenge of issuing guideline judgments as the English Court of Appeal did. The Supreme Court may not sense an urgency to assume this function because Nigeria's convict prison population is not bulging at the seams. However, extant penal legislation in the country raise a spectre of punitiveness that needs to be reined in. From a penological point of view, and as has been illustrated in this thesis, excessive punishments can be counterproductive. They lack a deterrent value and weaken the promise of the criminal law to award just punishments. It would therefore be useful, for instance, if the Supreme Court issued authoritative statements that reinforced the criminal law's commitment to a just system of punishments and enhanced the ratiocination of sentences that courts imposed, making it a necessary part of the process of judicial sentencing. The next chapter offers suggestions for achieving a principled approach to sentencing in Nigeria.

Chapter 7 Conclusion

7.1 Introduction

One of the underlying motivations for this research arose from previous reviews that the researcher conducted into prison conditions and prisoner's rights in Nigeria. During the review, it became obvious that overcrowding and inhumane quartering conditions in Nigerian prisons arise from problems that are endemic and inherent in Nigeria's criminal justice system, such as the tendency to resort to custodial measures for detention or punishment. With regards to the latter, the researcher realised that there is a lack of clarity in Nigeria's sentencing policy that continues to saddle courts with the difficult challenge of determining what principles or goals should be the predominant factor in sentencing in individual cases. The realisation was nothing new. As the thesis has shown, a good number of judicial pronouncements and scholarly writings on Nigeria's post-colonial criminal justice system have acknowledged it one way or the other. However, what has been unsettling is that long after Nigeria became self-governing, the problem has remained largely ignored.

Amidst the lack of clarity is a sentencing pattern that has leaned towards undue severity, illustrated in part by the fact that custodial sentencing is the most utilised penal remedy in Nigeria, even for petty, nonviolent crimes. Complementing the tendency toward severity is a lack of consistency in sentencing, which, as the thesis showed, stems from unduly wide discretion and unnecessarily punitive legislative provisions. The serious negative consequences that these have for offenders provided yet another motivation for this research. Penal legislation and sentencing discretion combine to abridge protections for human dignity in Nigeria.

To address these issues, the thesis set about finding answers to the overarching question regarding what measures will ensure that sentencers integrate proportionality principles in sentencing and avoid imposing penalties that infringe constitutional rights. Four sub-questions were also framed to explore the components of the main question. The thesis' primary concern was to see how sentencing discretion in Nigeria can be organised into a structured framework

that affirms the constitutionality and proportionality of punishment. Below is a summary of the findings.

7.2 Summary of Key Findings

This thesis commenced with a description of the problems associated with sentencing in Nigeria, noting amongst others that the lack of attention to the constitutionality and proportionality of punishments in academic writings in Nigeria highlights the importance of the contribution that the thesis seeks to make to penal scholarship in Nigeria. Chapter one portrayed how misuses of custodial sentences abridged human rights and sought to show why redressing such misuses must start with reforms that inject constitutionality and proportionality principles into the country's sentencing scheme.¹ To guide its quest for solutions, the thesis adopted a combination of comparative methods of legal research that offered a prism for examining the penal experiences of South Africa and Britain, with a view to extracting lessons in either countries' experiences with penal reforms that may be valuable for Nigeria. Using this prism, the thesis examined the socio-historical context of punishment and sentencing developments in all three countries, engaging also with an analysis of their respective sentencing jurisprudence. Further, the thesis embraced – as its main method of engagement with the issues – the criminological approach in discourses about punishment, which allowed the researcher to assume the accuracy of official accounts and research publications regarding sentencing problems in Nigeria. This approach in turn ensured that the thesis stayed focused on finding solutions to identified problems without having to collect and analyse primary data that depicted the problems. However, the thesis' preference for the criminological approach did not necessarily discard the philosophical² or sociological traditions,³ as both traditions were also useful to understanding the socio-historical context in which punishment evolved to assumed forms and meanings in the countries considered in the study.

The thesis commenced its search for answers to the overarching question by examining the meanings that attach to official claims concerning the purposes of punishment in Nigeria,

¹ See chapter 1 sections 2 & 4.

² See chapter 2 section s 3 & 4.

³ See chapter 3 section 1.

setting the discussion within broader discourses regarding the theories or purposes of punishment. The goal was to understand how Nigerian penal policy makers and sentencers conceptualise punishment in Nigeria, and how this has enhanced or failed to enhance consistency and proportionality.

As the thesis noted in chapter two, exclusively utilitarian or retributive accounts of punishment fail to offer an effective basis for allocating punishment. Punishment is neither solely utilitarian nor retributive, because sentencers often seek a combination of goals that may be deterrent, retributive, incapacitative or rehabilitative when sentencing. As such, traditional (i.e., exclusive) accounts of punishment do not offer sentencers a practical guide for distributing punishment or rationalising discretion. They do not offer a particularly useful scheme for moderating penal severity. The chapter noted that Nigeria's reliance on traditional accounts has engendered punitiveness in penal legislation and judicial sentences. It has also hindered the development of a useful sentencing jurisprudence.

These problems suggest the need to imagine a new rationality for allocating punishment in Nigeria. Chapter two made an attempt at it, by examining hybrid models of allocating punishment. Hybrid models combine utilitarian and retributivist principles in an attempt to reconcile the antinomy between traditional accounts. The earliest suggestions of the models came with the works of Hart and Rawls, amongst others. The quest for a more principled basis for allocating punishment prompted further hybrid refinements, eventually resulting in what came to be known as the modified theory of deserts. The theory became the most influential penal theory in the 1980s, and its premise was simple: offenders may only be punished to the extent that their crimes deserve and unnecessary penal suffering was to be avoided because it lacked a utilitarian value. By settling for deserts as a primary distributive principle, it spared sentencers the arduous task of selecting between conflicting objects of punishment. But it did more; it offered a scheme for ranking punishment in order of severity, ensuring that like-situated offenders receive like treatment in accord with the principle of equality and that sentencers had a model for choosing between penal sanctions.

These principles are relevant to reconstructing punishment and ensuring sentencing proportionality in Nigeria, but not to be left out of the emerging framework is the need for a moderating constitutional principle. Essentially, this principle asserts the need to protect the dignity of offenders by prohibiting cruel, inhuman and degrading punishments. But then, for a country with as low a rule of law compliance rating as Nigeria,⁴ the question may be why sentencers should begin to pay attention to ensuring that the human dignity of offenders enjoys constitutional protection. The question is important because as one philosopher rightly pointed out, the dignity of individuals is inextricably bound up in the fortunes of others, so that denying the dignity of others inevitably impedes the fulfilment of one's own dignity.⁵ Indeed, South African courts have rightly asserted that punishments that are grossly disproportionate or cruel, inhuman and degrading violate human dignity, and the court runs the risk of reducing itself to the level of the criminal when it leans towards excessive severity.⁶

Accordingly, a sentencing framework and the policy that underpins it must have due regard to the need to ensure that punishment complies with the standards established by the constitution, that offenders receive their just deserts and that similarly situated offenders are treated alike, having proper regard to those individual elements of the crime and the offender that may refine sentence. Punishments that fail these requirements risk being unconstitutional, because they violate necessary constitutional constraints on the power to punish.⁷ Courts are increasingly affirming these principles, but this is also because their respective national Constitutions have taken measures to ensure that protections against cruel, inhuman and degrading or grossly disproportionate punishments are provided for. Although these Constitutions do not expressly provide that punishments should be proportionate to the crime and the offender, courts have rightly affirmed proportionality as the test for determining whether

⁴ World Justice Project *Rule of Law Index 2014* (2014) World Justice Project, Washington DC 126; see also 2014 Ibrahim Index of African Governance (IIAG) available at <http://www.moibrahimfoundation.org/interact/>, accessed on 22 December 2014. The IIAG ranks Nigeria in the 44th position out of 52 African states under the Safety and Rule of Law index.

⁵ David G Kirchhoffer *Human Dignity in Contemporary Ethics* (2013) Teneo Press, Amherst 32.

⁶ See *S v Makwanyane* 1995 (2) SACR 1 (CC) at 48 para E – 53 para B; *S v Harrison* 1970 (3) SA 684 (A) at 686 para A; *S v Sparks and Another* 1972 (3) SA 396 (A); *S v V* 1972 (3) SA 611 (A) at 614 paras D-E; *S v Rabie* 1975 (4) SA 855 (A) at 861 para D and 862 paras C-D.

⁷ Chapter 4 section 3.1b.

punishments are consistent with human dignity, or do not violate the prohibition against cruel, inhuman or degrading punishments.⁸

How South Africa and Britain came to the point of establishing human rights constraints on punishment in their respective constitutions was the focus of chapter three. This entailed looking at punishment in a socio-historical and cultural context, to understand how punishment evolved to assume the meaning, uses, form and content that it has today. The analysis reveals quite an interesting trajectory, starting especially with basic notions about personal injury in medieval England, when distinctions between civil and criminal wrongs were unknown and punishment was exacted as a matter of private justice, lending it to extreme expressions of personal vindictiveness. This vindictiveness persisted through the age of Enlightenment and Industrialisation, when crime assumed a distinctive penal character, and Britain's propertied gentry assumed responsibilities for defining crime. Most of the crimes that emerged during this period were constructed to protect property rights, with a vastly significant number exacting the death penalty for crimes of minimal monetary value. Similar class structures were defining property relations in eighteenth century South Africa, with the result that Dutch colonists exacted severe penalties for crimes that threatened the society's political economy, though Britain's colonial presence had a rather moderate influence of constraining some of that severity. British colonial ambitions largely defined modern criminal law in Nigeria and one could find in both South Africa and Nigeria the significant impact that the English common law had in shaping the criminal law of both countries. Since both countries' colonial experience commenced in the 19th century, extending to the early twentieth century for South Africa and the mid twentieth century for Nigeria, penal attitudes for the most reflected corresponding attitudes in Britain. In South Africa, however, a racially segregated penal system subjected non-white citizens to a punitive penal regime.

But change eventually began especially in Britain and South Africa. In Britain, the changes were encouraged by increasing awareness of international human rights norms, which eventually resulted in the enactment of the Human Rights Act 1998. In South Africa, the change was ushered in by the transition from apartheid and the adoption of a Constitution with a Bill of

⁸ Ibid.

Rights. These developments changed the paradigm of punishment in both countries, ensuring that punishments came under high standards of constitutional scrutiny. The Human Rights Act and South Africa's Bill of Rights prohibit cruel, inhuman or degrading punishment,⁹ thereby indicating that the criminal law was not only focused on preventing crime. Equally important was the affirmation provided by the prohibition against cruel, inhuman or degrading punishment, that offenders have intrinsic human worth that should be protected through penal measures that offer offenders a meaningful opportunity to amend their behaviour. Unfortunately for Nigeria however, little has changed in its sentencing system since colonial era laws. Her approach to allocating punishment fails to engender rational sentencing or ensure that offenders receive punishment that is proportionate to their crime and individual circumstances, and consistent with human dignity. If Nigeria will chart a different course towards meaningful reforms, it must begin by integrating constitutional values that place proportionality at the core of respecting the rights of offenders.

Chapters 4 and 5 began to give attention to what a suitable sentencing scheme must look like. However, since Nigeria lagged behind considerably in penal development, the chapters focused more on South Africa. Chapter 4 took a closer look at the normative framework for punishment in South Africa and Nigeria. This normative framework consists of constitutional and legislative provisions that regulate punishment, as well as judicial interpretations that give the provisions meaning and content. Normativity necessarily starts with constitutional guarantees for human dignity – inclusive of the prohibition against cruel, inhuman or degrading punishments – amongst other rights, which South African courts have aptly interpreted as providing a benchmark for evaluating the constitutionality of punishment, or of statutory penalties. One of the benefits of adopting this benchmark is that it imposes constraints on penal severity, even if the constraints are more cardinal than ordinal due to the judicial position that a sentence must be grossly disproportionate to be unconstitutional. Nevertheless, the constitution – or the values it incorporates – constitutes the basic norm that underlies the system of penal laws. Accordingly, in South Africa the constitutionality of s 277 of the Criminal Procedure Act of 1977 and s 51 of the 1997 Criminal Law Amendment Act have been subjected to

⁹ Article 3 of the Human Rights Act 1998, and s 12(e) of the Constitution of the Republic of South Africa, 1996,.

constitutional validity tests, with the result that s 277, which prescribed the death penalty for certain crimes, had to be repealed, while the constitutionality of s 51 was upheld in the light of the judicial view that it allowed judicial discretion to depart from prescribed minimum sentences where the circumstances permit.

The judicial elaboration of the normative basis of sentencing in South Africa provides a model for Nigerian courts to emulate. As the thesis did show, the human dignity clause in Nigeria's 1999 Constitution is vague because of its omission of punishment. This has created a misleading presumption that penal statutes in Nigeria are constitutional when they have been duly passed by the legislature. Many of these statutes have been unduly punitive and have paid no regard to proportionality. Examples of such laws that the thesis discussed, include the Robbery and Firearms Act that prescribed the death penalty for armed robbery, sharia laws that prescribed decapitation and stoning to death for crimes like theft and adultery, and recent kidnap laws that also prescribe the death penalty. The list goes on to include prison sentences for offences that would have been better dealt with through non-custodial measures. Nigerian courts have considered themselves obligated to apply these laws without enquiring into whether the penalties they prescribe are proportionate, or could infringe the right to human dignity.

South Africa's Constitution of 1996 had a salutary effect on sentencing in the country. Prior to the adoption of the Constitution, sentencing for common law or statutory offences involved selecting a suitable utilitarian or retributive objective to which sentencing could be directed, following which a suitable sentence was selected by balancing a triad of factors involving the crime, the criminal and the interest of the public. The process was considerably discretionary, premised on the principle that sentencing is a matter for the discretion of the trial courts and that appellate courts should not interfere with such discretion unless it was not judiciously utilised. The mere fact that an appellate court would have imposed a different sentence was not sufficient reason for interfering with the discretion of the trial court. Accordingly, sentencers were at liberty to select an appropriate object to which sentencing could be directed and to strike a balance within the triad – without necessarily seeking parity between them – guided mostly by the impressions they formed about the gravity of the case, the circumstances of the offender and the public interests at stake (all of which may aggravate or

mitigate sentence), as well as such guidance as they could find in judicial precedents. They exercised considerable discretion while doing this and this fostered significant sentencing disparity.

Sentencing for rape portrays some of the disparities that emerge from the scope of discretion that South African courts exercise. In order to regulate discretion and ensure that criminal sentences were more consistent and proportionate to the gravity of the offence, South Africa enacted s 51 of the Criminal Law Amendment Act 105 of 1997. The provision provided minimum sentences for a range of violent or serious offences that included rape, and allowed departure only when ‘substantial and compelling circumstances’ were present. Initial judicial interpretations of what qualified as ‘substantial and compelling circumstances’ either asserted that the circumstances had to be exceptional, over and beyond traditional factors that courts had hitherto considered as aggravating or mitigating sentence, or that the phrase merely required courts to apply the traditional factors. These conflicting interpretations brought confusion to the meaning of the phrase, which the Supreme Court of Appeal resolved in the *Malgas* case. Essentially, *Malgas* established the principle that courts were to regard the minimum sentences as ordinarily appropriate, and as signalling the legislative intention that sentencing for the affected crimes were no longer to be business as usual. In other words, courts were to respect the intention of the legislature that the minimum sentences are to be the standard and may only depart from imposing them if substantial and compelling circumstances were present. Pertinently, the court held that an evaluation of substantial and compelling circumstances starts with a consideration of traditional sentencing factors. The court may only depart from the minimum sentence if after weighing the cumulative effect of all the factors that are relevant to sentencing, it forms the opinion that the prescribed sentence is disproportionate to the crime, the criminal and the interests of society as to make imposing it unjust.

In the *Dodo* case South Africa’s Constitutional Court affirmed that the *Malgas* principles were the determinative test for applying the substantial and compelling circumstances phrase. However, applying the test in individual rape cases has achieved less than the desired result, mainly due to the fact that it allows courts to continue exercising considerable discretion when determining how the test applied in individual cases, thereby frequently exposing the sentencing

process to the idiosyncrasies of individual sentencers. As such, applying the *Malgas* test failed to meet the need for proportionality, consistency and predictability in sentencing. Indeed, judicial applications of the test attracted criticisms, including the claim that departure from minimum sentences became the norm rather than the exception.¹⁰ In some sentencing appeals, members of the appellate panel differed considerably in how they applied the same sentencing principles and came to considerably different conclusions.¹¹ The Supreme Court of Appeal was compelled to acknowledge these disparities in the *Mudau* case and to suggest in *Vilakazi* that sentencing guidelines would indeed be a welcome development in South Africa's sentencing scheme. Not to be overlooked also is the court's pertinent observation that the absence of gradation in s 51's minimum sentences precipitated sentencing disparities. In Terblanche's views, discrepancies in sentencing for rape occur because there is little in the way of a principled sentencing guide for the crime.¹²

Although the thesis identified important milestones that South Africa has achieved in interpreting constitutional provisions relating to punishment, it also acknowledged that more needs to be done to rationalise discretion. Accordingly, chapter six examined two models for rationalising discretion, namely the Minnesota Sentencing Guideline, which apparently inspired s 51 of the Criminal Law Amendment Act and the English guideline model. The Minnesota guideline consists of a grid-based sentencing system that awards numerical values to offence seriousness and criminal history. These values represent a predetermined number of months that are presumed to be an appropriate term of imprisonment that may be imposed on an offender. The calibration of sentence severity on the basis of offence seriousness and criminal history reveals the strong deserts basis of the grid. However, dispositional lines in the grid may also emphasise incapacitation and a sentence that emphasises the offender's criminal history does in fact suggest that incapacitation was uppermost on the sentencer's mind.¹³

In its early years, the Minnesota sentencing guideline achieved the aims for which it was adopted. It kept the prison population low and within available correctional services, while also

¹⁰ See chapter 5 section 3.3.

¹¹ See chapter 5 section 4.

¹² See chapter 5 section 5.

¹³ See chapter 6 section 1.1*ii*.

de-emphasising prison sentences for property offences, reserving it for violent or serious offenders. Importantly, sentencing consistency increased considerably and a useful jurisprudence of permissible and impermissible departures emerged. However, there were hiccups. The guideline's approach to grouping offences into a handful of categories was rather elementary. It permitted a wide range of discretion that revived disparities between sentences. External pressures were also at work, coming from lawmakers who came under political pressures to adopt tough measures against crime. The results were legislation that prescribed stiffer penalties that sentencers, prosecutors and defence counsels felt were unfair, and thus to be circumvented. This eventually resulted in the emergence of evidence based sentencing, an approach that utilised empirically generated data to evaluate factors that enhance or diminish the risks of reoffending, provided details of the offender's criminogenic needs and set sentences. This was a very important development, but its tendency to base sentencing on risk factors rather than offence seriousness posed a problem.¹⁴

The chapter also examined the English guideline model. There were two reasons for this. First, Terblanche, one of the foremost contemporary scholars on South Africa's sentencing system, has suggested the English sentencing system as a model for South Africa to adopt, saying the guidelines contain statements of principles that make it more flexible than a grid-based system. The second reason emerges from the recommendations of the South African Law Commission, which had suggested that the ideal sentencing scheme for South Africa should aim at sentencing consistency and should be mindful of the state's correctional resources. The English model was clearly developed around these considerations, and has been quite successful in rationalising discretion in English sentencing.

The manner in which the model evolved apparently contributed to its success. It started with the English Court of Appeal issuing guideline judgments that recommended sentence levels and guidelines. Guideline judgments typically provided guidelines for a category of crimes or sentencing factors, giving indications of what should be considered to be the appropriate range of sentences, how sentencing legislation should be construed and what factors should aggravate or mitigate sentences. Although the guidelines were issued obiter, courts generally followed them.

¹⁴ Chapter 6 section 1.1v

However, the piecemeal manner in which the guidelines were developed as opportunities arose in individual cases could not satisfy the need for a comprehensive guideline that provided detailed guidelines for different categories of crimes. A number of developments unfolded to address this need, starting with the establishment of a Sentencing Advisory Panel to research, consult, advise and work with the Court of Appeal in developing guidelines and culminating with the establishment of the Sentencing Council of England and Wales, which then assumed powers to establish definitive sentencing guidelines. An important feature that linked these developments together was that the sentencing guidelines that the Sentencing Council began to issue incorporated elements that were developed in guideline judgments. An example of this is the sentencing starting point that was adopted for each category of offences. It is from the starting point that the sentencer commences calibrating sentence, adjusting the point up or down as the circumstances of the case may dictate. It is this element, the flexibility it provided, as well as the statement of principles that were contained in the guidelines that gave the English model an edge over the Minnesota sentencing grid.

However, when both models are examined together, one finds important principles that an ideal sentencing guideline model should incorporate. The principles are enumerated in the recommendations below.

7.3 Recommendations

By now, the range of reforms that Nigeria should embark upon is perhaps obvious, because they were discussed as the chapters in this thesis unfolded. Below, a summary of these possible solutions is presented.

There is clearly a myriad of challenges confronting Nigeria's sentencing system, which requires a multi-layered programme of solutions. The first necessary course of action is to revisit the normative framework for sentencing in Nigeria, in order to instate a clear and unambiguous protection against cruel, inhuman or degrading punishment and resolve the problem of excessive penal severity in criminal legislation. Recommended for reform is s 34 of the Nigerian

Constitution of 1999. Section 34 is the provision that guarantees respect for human dignity. Subsec (1)(a) thereof prohibits torture, inhuman or degrading treatment, but makes no corresponding prohibitions against inhuman or degrading punishment. The thesis argued that this omission is inconsistent with the history of human dignity provisions in Nigeria's earlier Constitutions, notably the 1960 and 1963 Constitutions, both of which expressly prohibited torture, inhuman or degrading punishment or treatment. Also, and at the very least, the omission in the 1999 Constitution shrouds the meaning of the human dignity clause or the prohibitions therein with ambiguity, which also weakens the provision, or leaves offenders without protection against forms of punishment that violate human dignity. An appropriate response to this constitutional lapse would therefore be to amend s 34(1)(a) to include a prohibition against inhuman or degrading punishment. Better still, the additional epithet, 'cruel', should be added to the list.

An amendment of this nature would also serve the additional purpose of establishing cardinal limits on punishment. The importance of such limits was discussed in chapters two and six. Cardinal limits anchor the outer limits of a penal scale, establishing limits of tolerance for penal severity relative to the offence. However broadly defined outer limits may be, they fulfil the important function of imposing a ceiling on the penalties that sentencers may impose. Thus, a principle of proportionality comes into play, ordering the stage for ensuring penal relativity between offences, such that when penalties for crimes like theft, burglary, bribery, rape, armed robbery and murder are compared, defensible differences in penal severity are revealed. However, as the thesis pointed out, constitutional provisions do better at defining the outer boundaries of penal severity. They do not establish ordinal rankings between categories of offence seriousness. They must be supplemented by sentencing guidelines to achieve ordinal proportionality.

This requires not just developing guidelines. It necessitates a more fundamental look at the legislative framework that will underpin the guideline. As the thesis suggested, the legislative framework must comply with the constitutional reforms suggested above. This will entail a holistic look at the penal system, in order to remove the contradictions that arise from the system's pluralism, in which different codes, statutes and sharia establish different standards for

punishing criminal behaviour. Thus, it is expedient to unify penal law and procedure in Nigeria and to repeal needlessly punitive laws. These suggestions are not new. They have been the subject of discussion in different forums, including the Nigerian Institute of Advanced Legal Studies and the National Working group on the Reform of Criminal Justice Administration, which produced a draft Administration of Criminal Justice Bill.¹⁵ What needs to be done at this point, is to take the process forward by passing the necessary law without further delay. Resolving the sharia question would however require a different approach. First, whether sharia criminal law should be enforced in Nigeria's penal system has to be resolved through a constitutional process.¹⁶ Secondly, the constitutional process may also have to determine whether sharia criminal law should be assimilated and made part of a uniform penal system. Lastly, should the question be resolved in favour of assimilating sharia, its penalties, processes and evidentiary standards have to be subjected to the scrutiny of the proposed constitutional standards regarding human dignity and the prohibition of punishments that violate dignity.

However, constitutional and legislative reforms take time, especially when this has to do with reforming the penal system. Protracted efforts to reform Nigeria's criminal justice system exemplify the point and raise the important question of what can be done in the interim while reforms go through necessary constitutional and legislative amendment. The English example of developing a guideline system offers a useful model for Nigeria to emulate. As noted above, the English example starts with guideline judgments. A suitable role for Nigeria's Supreme Court to discharge in this regard would be to begin to issue sentencing guidelines in sentencing appeals that come before it. The court should begin to offer guidance on what should be the appropriate sentencing range and starting points for such crimes, how to interpret the relevant legislation, what sentencing factors would be relevant and how sentence could be aggravated or mitigated.

Of course, discharging this role requires readiness on the part of the court to examine the appropriateness of many statutorily prescribed penalties against the all-important principle of proportionality. The Supreme Court, and indeed Nigerian sentencers generally, must reconceive

¹⁵ See chapter 4 section 4.6.

¹⁶ This in turn would require a carefully managed political process, as sharia criminal law has been much politicised in Nigeria. See Carina Tertsakian "Political Shari'a"? Human Rights and Islamic Law in Northern Nigeria (2004) Vol. 16 No. 9(A) *Human Rights Watch* 1

their role from that of unquestioningly accepting, interpreting and enforcing statutory penalties. They must envision a new role that is rooted in the present constitutional scheme, which authorises them to scrutinise the constitutionality of any penalty that is prescribed by law, in order to ensure that the limitation of rights contained therein is such that can be tolerated within the democratic society that the Nigerian Constitution envisions for the country. Nigerian courts have had a history of questioning the constitutional validity of duly passed legislation. In *Independent National Electoral Commission and Another v Musa and Others*,¹⁷ the Supreme Court of Nigeria declared certain provisions of the Electoral Act 2001 null and void for violating the provisions of 1999 Constitution.¹⁸ There is a respectable history of judicial annulments of statutory provisions that violate constitutional provisions in Nigeria. There is therefore no reason why penal statutes or penalties cannot be subjected to similar levels of constitutional scrutiny. The failure of Nigerian courts to do this constitutes a serious lapse.

It is not too late to rectify this lapse. Even if courts were to find it difficult to do so because of the ambiguity in s 34(1)(a), they may yet have recourse to the human dignity provision of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act. Article 5 of the Charter provides a more comprehensive guarantee for human dignity by prohibiting cruel, inhuman and degrading punishment. In *Fawehinmi v Abacha*, the Supreme Court held that the Act would prevail over other national legislation (the Constitution excluded) in the event of a conflict. Courts may seize on the opportunity afforded by the Act to ensure that punishments are not so severe and disproportionate in kind and measure as to constitute cruel, inhuman or degrading punishment.

To develop guideline judgments, the Supreme Court may seek assistance from agencies that are carrying out research and proposing criminal justice reforms in Nigeria, such as the Nigerian Law Reform Commission, or the Nigerian Institute of Advanced Legal Studies. They may be invited as *amici curiae*, in order to increase the range of inputs in the guidelines that

¹⁷ (2003) AHRLR 192 (NgSC 2003).

¹⁸ The provisions related to the conditions of eligibility that an association must satisfy to be registered as a political party. The court held that the provisions of the Constitution were exhaustive on the subject, and that additional provisions legislated in the Electoral Act 2001, and in guidelines issued by the Independent National Electoral Commission pursuant to the Act, were null and void.

would ensure its wider acceptability. That said, judicial development of guideline principles can only be an interim measure. Its case-by-case approach makes it painstakingly slow and inadequate to the need for a comprehensive guideline. That need would be best served through a specialised agency established in line with the principles advocated in chapter six, to research and consult widely for the purpose of developing sentencing guidelines.

Only the key principles need be restated here. First, the agency must be an autonomous one, constituted to ensure that the judges, magistrates, agencies within the criminal justice system, penal scholars and experts in victimisation are represented in its membership. This will ensure that all necessary views are included in the development of guidelines and that the final outcome is acceptable to those who will implement them. The agency should also have powers to recommend the enactment or amendment of penal legislation. An independent agency will ensure that the development of sentencing policy and guidelines is insulated from the kind of political pressures that gave rise to sharia criminal codes in northern Nigeria, or the kind of emotive responses that resulted in laws that mandated the death penalty for kidnapping. Secondly, it will be useful that the legislation that establishes the agency also provides a primary rationale for sentencing. This is not to suggest that a statement of primary rationale in legislation is a *sine qua non* for the success of a sentencing guideline. However, a legislative statement or a primary rationale that is supplemented by a list of key principles that further rationalizes discretion by narrowing the range of principles that sentencers have to consider will at least enhance consistency.

Thirdly, the guideline must be anchored on cardinal and ordinal scales that introduce limits on severity and enhance proportionality in sentences for various offences, while also ensuring that sentences are not bunched into clusters that obscure differences in offence gravity. It must pay attention to the equality principle in proportionality, which ensures that like situated offenders receive similar punishments and that sentences reflect the differences in offence gravity. Also, the guideline and the policy underlying it should ensure that the most severe sentences are reserved for serious offences. This would require a change of legislative and judicial policy on the use of prison sentences and the adoption or development of other penal alternatives. As a principle, prison sentences should be reserved for violent, serious or habitual

offenders who pose a real threat to society and need to be incapacitated. The death penalty, if at all sanctioned, should be reserved for crimes involving human life.

Some penal alternatives already exist in Nigeria.¹⁹ Nigerian courts, with guidance from the Supreme Court, need to develop jurisprudence around utilising the alternatives. They need to elaborate how sentencers can adopt an evidence-based approach to sentencing and emphasise the imperative for sentencers to offer logical explanations for the sentences they impose. Adopting an evidence-based approach calls for the leading of evidence solely for sentencing purposes: witnesses testify in aggravation or mitigation of sentence and the court may draw on the expertise of behavioural experts, social workers and experts in victimisation to reach an appropriate sentence. Subjecting sentencing to a trial-led process will indeed bring a paradigm change to sentencing in Nigeria. Lawyers, on their part, need to become proactive in subjecting prescribed sentences to constitutional scrutiny and proportionality tests.

The potential that these recommendations have for reforming Nigeria's sentencing scheme will of course be curtailed if the State does not create the necessary infrastructure for implementing alternative non-custodial sentences. Necessary infrastructure will include an efficient system for managing criminal information, recruiting, training, and deploying social workers, probation officers and community service supervisors, while also providing for a parole system.²⁰ Given recent publications that claim that the staff-inmate ratio in the Nigerian Prisons Service is almost one to two,²¹ it may even be proposed that some prison officials should be

¹⁹ See chapter 4 section 4.4.

²⁰ There is no parole system for adult offenders in Nigeria, though juvenile offenders may be released on parole. See Obi NI Ebbe 'Nigeria' in World Factbook of Criminal Justice Systems, available at <http://www.bjs.gov/content/pub/ascii/WFBCJNIG.TXT>, accessed on 28 December 2014. However, a bill to establish a national parole system is sitting before the Nigerian National Assembly. See Olaniran Samuel 'Parole system and prison decongestion' (2008) The Nation available at http://www.thenationonline.net/archive2/tblnews_Detail.php?id=61768, accessed 28 December 2014.

²¹ Andrew M Jefferson 'Prison officer training and practice in Nigeria' (2007) Vol. 9 no. 3 *Punishment and Society* 253-269 at 258; the researcher's attempts to access official records of the ratio of prison officers to prisoners encountered a dearth of data on the subject. Data on the staff strength of the Nigerian Prison Service could not be found on the Service's website or from statistical publications of the National Bureau of Statistics. However an old publication claims that the staff strength of the prisons service was 18,000, when the prison population was 58,000, putting the ration at 1:3.2. See Clement Nwankwo, Bonny Ibhawho & Dulue Mbachu *The Failure of Prosecution: A Report of the Prosecution of Criminal Suspects in Nigeria* (1996) Constitutional Rights Project, Lagos 16. In a 2008 publication, Amnesty international reported that a total number of almost 25,000 staff serviced 45,000 prison inmates, of which 25,000 were pre-trial detainees. This suggests a ration of more than one prison officer to every

redeployed and retrained to implement alternative sanctions. That way, the State incurs less costs recruiting and training new hands, while also increasing the capacity of those already in the State's correctional services to work more efficiently.

7.4 Conclusion

The above recommendations are offered with a view to encouraging less use for prison sentences, reserving them for habitual, serious or violent offenders. These recommendations are consistent with the idea that sentencing policies should utilise the available prison resources of the state efficiently, and that prison levels are kept within the capacity of prison facilities. However, the recommendations are such that they may only be achieved in the long term. Reforms engage a slow process that demands significant political will to see them through. The recommendations in this thesis demand political will from lawmakers in starting a process that will result in the establishment of a specialised agency that will lead the process of formulating guidelines on an ongoing basis, and, having done so, to refrain from interfering with the autonomy of the agency. In the short to medium term however, the process or reform must be led by Supreme Court, which must assume responsibilities for developing an effective sentencing guidelines and jurisprudence, which the proposed specialised sentencing agency may take into consideration in its work.

It will be instructive to conclude this thesis with a few insights from Morris and Wilson. According to Morris,²² '[n]o principled jurisprudence of sentencing will emerge before legislatures bring order to their penal statutes or before judges routinely provide reasons for the sentences they impose. Only in this manner can the broad and detailed sweep of a common law of sentencing evolve'. This thesis illustrated Morris' point by showing the constitutional reforms that are needful, and that it is necessary to review and unify Nigeria's penal laws in order to

two prison inmates, or two or more prison officers for every convict inmate. See Amnesty International *Prisoner's Rights Systematically Flouted* (2008) 21. Although an acceptable staff to prisoner ratio may depend on the circumstances, current distribution rates in Nigeria, where prison mostly warehouses offenders, and a good number are incarcerated for minor offences, can hardly be said to be an efficient way to utilise prison resources.

²² Morris, Noval 'The future of imprisonment: Toward a punitive philosophy (1974) Vol. 72 No. 6 *Michigan Law Review* 1161-1180 at 1176, see generally 1173-1175.

reduce the propensity for sentencing disparities. It has also illustrated that courts need to develop Nigeria's sentencing jurisprudence by scrutinising the constitutionality of punishments and offering reasons for the penalties that they impose. At its very core, needful reforms must embrace three values suggested by Wilson,²³ namely moderation, speed and certainty. These qualities, in his aptly held view, infuse punishment with a preventative quality. In his words:

‘When ... punishments are moderate and mild, everyone will, from a sense of interest and of duty, take his proper part in detecting, in exposing, in trying, and in passing sentence on crimes. The consequence will be, that criminals will seldom elude the vigilance, or baffle the energy, of publick justice.’²⁴

Mildness does not necessarily suggest that penalties should be tame. Severity may be necessary in deserved cases, but adopting severity as a method of crime control – as is the case in Nigeria – over-criminalises and overheats the penal system.²⁵ Wilson's words provide compelling reasons for Nigeria to chart a course away from its tradition of penal severity:

True it is, that, on some emergencies, excesses of a temporary nature may receive a sudden check from rigorous penalties: but their continuance and their frequency introduce and diffuse a hardened insensibility among the citizens; and this insensibility, in its turn, gives occasion or pretence to the farther extension and multiplication of those penalties. Thus one degree of severity opens and smooths the way for another, till, at length, under the specious appearance of necessary justice, a system of cruelty is established by law.

Such a system is calculated to eradicate all the manly sentiments of the soul, and to substitute, in their place, dispositions of the most depraved and degrading kind. It is the parent of *pusillanimity*. A nation broke to cruel punishments becomes dastardly and contemptible. For, in nations, as well as individuals, cruelty is always attended by cowardice. It is the parent of *slavery*. In every government, we find the genius of freedom depressed in proportion to the sanguinary spirit of the laws. It is hostile to the prosperity of nations, as well as to the dignity and virtue of men.²⁶

²³ James Wilson (1791), <http://www.revolutionary-war-and-beyond.com/james-wilson-grand-jury-1791.html>, accessed 29 December 2014.

²⁴ Ibid.

²⁵ See AA Adeyemi ‘The criminal process as a selection instrument for the administration of criminal justice’ in Adedokun A Adeyemi *Nigerian Criminal Process* (1977) 26-70 at 29-51.

²⁶ Wilson op cit note 23.

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APPENDIX A

CRIMINAL LAW AMENDMENT ACT 105 OF 1997

Excerpt of Section 51

51 Discretionary minimum sentences for certain serious offences

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

- (i) a first offender, to imprisonment for a period not less than 15 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) Part III of Schedule 2, in the case of-

- (i) a first offender, to imprisonment for a period not less than 10 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(c) Part IV of Schedule 2, in the case of-

- (i) a first offender, to imprisonment for a period not less than 5
- (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years;

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part I of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(a A) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
- (ii) an apparent lack of physical injury to the complainant;
- (iii) an accused person's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused person and the complainant prior to the offence being committed.

(4)

[Sub-s. (4) omitted by s. 1 of Act 38 of 2007.]

(5) (a) Subject to paragraph (b) , the operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

(b) Not more than half of a minimum sentence imposed in terms of subsection (2) may be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977, if the accused person was 16 years of age or older, but under the age of 18 years, at the time of the commission of the offence in question.

(6) This section does not apply in respect of an accused person who was under the age of 16 years at the time of the commission of an offence contemplated in subsection (1) or (2).

(7) If in the application of this section the age of an accused person is placed in issue, the onus shall be on the State to prove the age of that person beyond reasonable doubt.

(8) For the purposes of this section and Schedule 2, 'law enforcement officer' includes-

- (a) a member of the National Intelligence Agency or the South African Secret Service referred to in section 3 of the Intelligence Services Act, 2002 (Act 65 of 2002); and
- (b) a correctional official of the Department of Correctional Services or a person authorised under the Correctional Services Act, 1998 (Act 111 of 1998).

(9) The amounts mentioned in respect of the offences referred to in Part II of Schedule 2 to the Act, may be adjusted by the Minister from time to time by notice in the Gazette.

[S. 51 amended by s. 33 of Act 62 of 2000 and by s. 36 (1) of Act 12 of 2004 and substituted by s. 1 of Act 38 of 2007.]

APPENDIX B

THE MINNESOTA SENTENCING GUIDELINES GRID

(Effective from 1 August 2014)

4.A. Sentencing Guidelines Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in <i>italics</i>)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Murder, 2nd Degree</i> (<i>intentional murder; drive-by-shootings</i>)	11	306 <i>261-367</i>	326 <i>278-391</i>	346 <i>295-415</i>	366 <i>312-439</i>	386 <i>329-463</i>	406 <i>346-480</i> ²	426 <i>363-480</i> ²
<i>Murder, 3rd Degree</i> <i>Murder, 2nd Degree</i> (<i>unintentional murder</i>)	10	150 <i>128-180</i>	165 <i>141-198</i>	180 <i>153-216</i>	195 <i>166-234</i>	210 <i>179-252</i>	225 <i>192-270</i>	240 <i>204-288</i>
<i>Assault, 1st Degree</i> <i>Controlled Substance Crime, 1st Degree</i>	9	86 <i>74-103</i>	98 <i>84-117</i>	110 <i>94-132</i>	122 <i>104-146</i>	134 <i>114-160</i>	146 <i>125-175</i>	158 <i>135-189</i>
<i>Aggravated Robbery, 1st Degree</i> <i>Controlled Substance Crime, 2nd Degree</i>	8	48 <i>41-57</i>	58 <i>50-69</i>	68 <i>58-81</i>	78 <i>67-93</i>	88 <i>75-105</i>	98 <i>84-117</i>	108 <i>92-129</i>
<i>Felony DWI; Financial Exploitation of a Vulnerable Adult</i>	7	36	42	48	54 <i>46-64</i>	60 <i>51-72</i>	66 <i>57-79</i>	72 <i>62-84</i> ^{2,3}
<i>Controlled Substance Crime, 3rd Degree</i>	6	21	27	33	39 <i>34-46</i>	45 <i>39-54</i>	51 <i>44-61</i>	57 <i>49-68</i>
<i>Residential Burglary</i> <i>Simple Robbery</i>	5	18	23	28	33 <i>29-39</i>	38 <i>33-45</i>	43 <i>37-51</i>	48 <i>41-57</i>
<i>Nonresidential Burglary</i>	4	12 ¹	15	18	21	24 <i>21-28</i>	27 <i>23-32</i>	30 <i>26-36</i>
<i>Theft Crimes (Over \$5,000)</i>	3	12 ¹	13	15	17	19 <i>17-22</i>	21 <i>18-25</i>	23 <i>20-27</i>
<i>Theft Crimes (\$5,000 or less)</i> <i>Check Forgery (\$251-\$2,500)</i>	2	12 ¹	12 ¹	13	15	17	19	21 <i>18-25</i>
<i>Sale of Simulated Controlled Substance</i>	1	12 ¹	12 ¹	12 ¹	13	15	17	19 <i>17-22</i>

¹ 12¹=One year and one day



Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from the Guidelines under Minn. Stat. § 609.185. See section 2.E, for policies regarding those sentences controlled by law.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.

² Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. See section 2.C.1-2.

³ The stat. max. for Financial Exploitation of Vulnerable Adult is 240 months; the standard range of 20% higher than the fixed duration applies at CHS 6 or more. (The range is 62-86.)

APPENDIX C

ASSAULT DEFINITIVE GUIDELINES PREPARED BY
THE
SENTENCING COUNCIL FOR ENGLAND AND WALES

Excerpt of the Sentencing Guidelines for
Assault Occasioning Actual Bodily Harm

Applicability of guideline

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all offenders aged 18 and older, who are sentenced on or after 13 June 2011, regardless of the date of the offence.

Section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

“Every court –

- (a) must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender's case, and
- (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.”

This guideline applies only to offenders aged 18 and older. General principles to be considered in the sentencing of youths are in the Sentencing Guidelines Council's definitive guideline, *Overarching Principles – Sentencing Youths*.

Structure, ranges and starting points

For the purposes of section 125(3)-(4) of the Coroners and Justice Act 2009, the guideline specifies *offence ranges* – the range of sentences appropriate for each type of offence. Within each offence, the Council has specified three *categories* which reflect varying degrees of seriousness. The offence range is split into *category ranges* – sentences appropriate for each level of seriousness. The Council has also identified a starting point within each category.

Starting points define the position within a category range from which to start calculating the provisional sentence. **Starting points apply to all offences within the corresponding category and are applicable to all offenders in all cases irrespective of plea or previous convictions.** Once the starting point is established the court should consider further aggravating and mitigating factors and previous convictions so as to adjust the sentence within the range. Credit for a guilty plea is taken into consideration only at step 4 in the process, after the appropriate sentence has been identified.

Information on community orders and fine bands is set out in the annex at page 27.

Contents

Applicability of guideline	2
Causing grievous bodily harm with intent to do grievous bodily harm/Wounding with intent to do grievous bodily harm (section 18)	3
Inflicting grievous bodily harm/Unlawful wounding (section 20)	7
Assault occasioning actual bodily harm (section 47)	11
Assault with intent to resist arrest (section 38)	15
Assault on a police constable in execution of his duty (section 89)	19
Common assault (section 39)	23
Annex: Fine bands and community orders	27

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Assault occasioning actual bodily harm

Offences against the Person Act 1861 (section 47)

Racially/religiously aggravated ABH

Crime and Disorder Act 1998 (section 29)

These are specified offences for the purposes of section 224 of the
Criminal Justice Act 2003

Triable either way

Maximum (section 47): 5 years' custody

Maximum (section 29): 7 years' custody

Offence range: Fine – 3 years' custody

STEP ONE**Determining the offence category**

The court should determine the offence category using the table below.

Category 1	Greater harm (serious injury must normally be present) and higher culpability
Category 2	Greater harm (serious injury must normally be present) and lower culpability; or lesser harm and higher culpability
Category 3	Lesser harm and lower culpability

The court should determine the offender's culpability and the harm caused, or intended, by reference **only** to the factors identified in the table below (as demonstrated by the presence of one or more). These factors comprise the principal factual elements of the offence and should determine the category.

Factors indicating greater harm

Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence (must normally be present)

Victim is particularly vulnerable because of personal circumstances

Sustained or repeated assault on the same victim

Factors indicating lesser harm

Injury which is less serious in the context of the offence

Factors indicating higher culpability**Statutory aggravating factors:**

Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)

Offence motivated by, or demonstrating, hostility to the victim based on the victim's disability (or presumed disability)

Other aggravating factors:

A significant degree of premeditation

Use of weapon or weapon equivalent (for example, shod foot, headbutting, use of acid, use of animal)

Intention to commit more serious harm than actually resulted from the offence

Deliberately causes more harm than is necessary for commission of offence

Deliberate targeting of vulnerable victim

Leading role in group or gang

Offence motivated by, or demonstrating, hostility based on the victim's age, sex, gender identity (or presumed gender identity)

Factors indicating lower culpability

Subordinate role in group or gang

A greater degree of provocation than normally expected

Lack of premeditation

Mental disorder or learning disability, where linked to commission of the offence

Excessive self defence

STEP TWO**Starting point and category range**

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Offence Category	Starting Point <i>(Applicable to all offenders)</i>	Category Range <i>(Applicable to all offenders)</i>
Category 1	1 year 6 months' custody	1 – 3 years' custody
Category 2	26 weeks' custody	Low level community order – 51 weeks' custody
Category 3	Medium level community order	Band A fine – High level community order

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When sentencing **category 2** offences, the court should also consider the custody threshold as follows:

- has the custody threshold been passed?
- if so, is it unavoidable that a custodial sentence be imposed?
- if so, can that sentence be suspended?

When sentencing **category 3** offences, the court should also consider the community order threshold as follows:

- has the community order threshold been passed?

Factors increasing seriousness

Statutory aggravating factors:

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors include:

Location of the offence

Timing of the offence

Ongoing effect upon the victim

Offence committed against those working in the public sector or providing a service to the public

Presence of others including relatives, especially children or partner of the victim

Gratuitous degradation of victim

In domestic violence cases, victim forced to leave their home

Failure to comply with current court orders

Offence committed whilst on licence

An attempt to conceal or dispose of evidence

Failure to respond to warnings or concerns expressed by others about the offender's behaviour

Commission of offence whilst under the influence of alcohol or drugs

Abuse of power and/or position of trust

Exploiting contact arrangements with a child to commit an offence

Established evidence of community impact

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Offences taken into consideration (TICs)

Factors reducing seriousness or reflecting personal mitigation

No previous convictions **or** no relevant/recent convictions

Single blow

Remorse

Good character and/or exemplary conduct

Determination and/or demonstration of steps taken to address addiction or offending behaviour

Serious medical conditions requiring urgent, intensive or long-term treatment

Isolated incident

Age and/or lack of maturity where it affects the responsibility of the offender

Lapse of time since the offence where this is not the fault of the offender

Mental disorder or learning disability, where **not** linked to the commission of the offence

Sole or primary carer for dependent relatives

Section 29 offences only: The court should determine the appropriate sentence for the offence without taking account of the element of aggravation and then make an addition to the sentence, considering the level of aggravation involved. It may be appropriate to move outside the identified category range, taking into account the increased statutory maximum.

STEP THREE**Consider any other factors which indicate a reduction, such as assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP FIVE**Dangerousness**

Assault occasioning actual bodily harm and racially/religiously aggravated ABH are specified offences within the meaning of Chapter 5 of the Criminal Justice Act 2003 and at this stage the court should consider whether having regard to the criteria contained in that Chapter it would be appropriate to award an extended sentence.

STEP SIX**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.

STEP SEVEN**Compensation and ancillary orders**

In all cases, the court should consider whether to make compensation and/or other ancillary orders.

STEP EIGHT**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE**Consideration for remand time**

Sentencers should take into consideration any remand time served in relation to the final sentence. The court should consider whether to give credit for time spent on remand in custody or on bail in accordance with sections 240 and 240A of the Criminal Justice Act 2003.